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No.

In The

Supreme Court of the United States

PAUL PALMIERI,
Petitioner,

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, ERIN M. CROTTY, Commissioner and MOLLY T. McBRIDE, Administrative Law Judge,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

R. BERTIL PETERSON
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QUESTION PRESENTED FOR REVIEW

1. Did petitioner's refusal to surrender his Fourth Amendment right to security in his property necessitate the denial of his permit application?

2. Did petitioner fail to meet his burden of demonstrating that respondent's demand for a pre-permit inspection on his property was unreasonable and unnecessary in order to evaluate petitioner's application for a tidal wetlands permit authorizing construction of a dock extension and boat lifts in the water 92 feet away form petitioner's yard?

3. Does CPLR 306-b provide courts with discretion to extend a complainant's time to serve defendants in order to avoid the kind of miscarriage of justice that took place in this case, in light of the deprivation by the respondent of the petitioner's Fourth Amendment rights?

4. Did the ruling of the Commissioner of the NYSDEC demonstrate an utter disregard for the United States Constitution that should be vacated, annulled and reversed?

5. Was the lower court's dismissal of petitioner's petition upon the ground that it was time barred a miscarriage of justice?

6. Did respondent, as punishment for his refusal to abide a violation of his Fourth Amendment rights, unreasonably refuse to conduct a pre-permit

QUESTION PRESENTED FOR REVIEW
(Continued)

inspection of the area adjacent to, and beneath, an existing dock that protrudes 92 feet away from petitioner's yard and into the bay using a boat, a method which had been used previously during a pre-permit inspection of petitioner's prior tidal wetlands' permit application and which is the only reasonable way of inspecting the area in question?

7. Should the "special needs" test be expanded to permit a governmental agency to deny a private property owner his right against unreasonable searches, and to be secure in his property, as protected by the Fourth Amendment to the United States Constitution under circumstances where a governmental agency seeks access to private property as part of a construction permit process, not an emergency criminal investigation or prevention?

8. Should all private owners of waterfront property be stripped of their Fourth Amendment right against unreasonable searches and seizures and to be secure in their property because their rear property faces a body of water?

9. Did respondent, as punishment for petitioner's refusal to abide a violation of his Fourth Amendment rights, unreasonably refuse to conduct a pre-permit inspection of the area adjacent to, and beneath, an existing dock that protrudes 92 feet away from petitioner's yard and into the bay using a boat, a

QUESTION PRESENTED FOR REVIEW
(Continued)

method which had been used previously during a pre-permit inspection of petitioner's prior tidal wetlands' permit application and which is the only reasonable way of inspecting the area in question?

10. Could respondents even conduct a warrantless pre-permit inspection, while on petitioner's property, of an area in a bay adjacent to, and beneath, an existing dock that protrudes 92 feet away from petitioner's yard?

11. Was respondents' denial of petitioner's tidal wetlands' permit application, as punishment for his refusal to abide a violation of his Fourth Amendment Rights, upon the ground that petitioner refused to give his consent to a pre-permit warrantless inspection of his property and the area adjacent to, and beneath, an existing dock that protrudes 92 feet away from his yard and into the bay, a violation of petitioner's right against unreasonable search and seizure under the Fourth Amendment to the United States Constitution?

12. Assuming that respondents demonstrated a special need" to enter petitioner's property, did such need constitute a constitutionally acceptable exception to plaintiff's right not to be subjected to an unreasonable search and seizure under the Fourth Amendment to the United States Constitution?

QUESTION PRESENTED FOR REVIEW
(Continued)

13. Is a warrantless pre-permit inspection during which representatives of a governmental agency walk through closed gates across the front yard, side yard, and entire length of the back yard of petitioner's private residential property a minimal intrusion?

14. Was a warrantless pre-permit inspection on petitioner's private residential property a matter of governmental interest?

15. Did respondent governmental agency demonstrate disregard for its own rules and the rule of law by not deeming petitioner's application for a wetlands' permit complete pursuant to ECL §70-0109(1)(a) and (b) and 6 NYCRR §621.5 (b)(2) and by failing to send petitioner its first notice of incomplete application within 15 days of its receipt of petitioner's permit application as the afore-mentioned rules require?

16. Did the respondent governmental demonstrate disregard for its own rules and the rule of law by not deeming petitioner's application for a wetlands' permit complete pursuant to ECL §70-0109(1)(d) and by failing to send petitioner its second notice of incomplete application within 15 days of its receipt of additional information from petitioner as the afore-mentioned rules require?

LIST OF PARTIES

The parties are the petitioner, Paul Palmieri, and the respondent, the New York State Department of Environmental Conservation hereafter ("DEC").

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The opinion of the Court of Appeals, State of New York, the court below, is reported at 2006 N.Y. LEXIS 3585 (November 21, 2006); and the opinion of the Appellate Division of State Supreme Court, Second Department, is reported at 31 A.D.3d 647 (2d Dept. 2006). The opinion of the Supreme Court of the State of New York, County of Suffolk, is not reported.

DATE JUDGMENT ENTERED

The order of the Supreme Court of the State of New York, County of Suffolk, which is dated January 5, 2005 was filed on January 5, 2005.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. Section 1257.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision involved is the Fourth Amendment to the U.S. Constitution which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The statutes involved are 6 NYCRR Sections 621.1[c], 621.7[f] and 621.15[b], Civil Practice Law and Rules ("CPLR") Sections 306-b, 307(1) and (2), CPLR Rules 2103(b)(2) and 3025(a), Conservation Law Sections 429-c and 432(1), Environmental Conservation Law ("ECL") Sections 15-0501, 15-0503, 15-0505 15-0515, 15-0905 and 25-0404, General Construction Law Section 20 and Navigation Law Section 32.

STATEMENT OF THE CASE

This is an appeal from a decision and order dated and entered on November 21, 2006 of the Court of Appeals of the State of New York denying petitioner's motion for leave to appeal an order of the Appellate Division, Second Department, dated and entered in the office of the Clerk of the Appellate Division on July 18, 2006, holding that the *nisi prius* court properly dismissed the petitioner's petition as time barred; the *nisi prius* court correctly applied the 30-day limitations period in ECL 25-0404 and held that the petition, filed 57 days after the determination of the Commissioner of the State of New York Department of Environmental Conservation (hereafter "DEC") was untimely citing *Matter of Oak Is. Beach Assn v. Flacke*, 96 A.D.2d 841 (2d Dept. 1983) mot. leave den. 62 N.Y.2d 606 (1984); the petitioner offered no good cause for his delay in serving the DEC, and that branch of his cross motion which was for leave to extend the time for service was made over three months after his first attempt at service; and that the *nisi prius* court providently exercised its discretion in denying that branch of the cross motion citing *Matter of Saltzman v. Board of Appeals of Vil. of Roslyn*, 26 A.D.3d 505, 506, 811 N.Y.S.2d 99 (2d Dept. 2006) and *Colon v. Bailey*, 26 A.D.3d 454, 455-456, 810 N.Y.S.2d 511 (2d Dept. 2006)).

In a companion case, argued in, and decided by the Appellate Division, Second Department, on the same day[1]; decided by the Court of Appeals of the State of New York, on the same day, for which review is being sought in a petition for a writ of certiorari that will be submitted to this Court on the same day as the within petition, the Appellate Division, Second Department, ruled as follows:

> "In a proceeding pursuant to CPLR article 78 to review a determination of the New York State Department of Environmental Conservation pursuant to Environmental Conservation Law articles 15 and 25 that, inter alia, the petitioner's application for a permit to extend his dock was incomplete, the petitioner appeals, as limited by his brief, from stated portions of a judgment of the Supreme Court, Suffolk County (Baisley, J.), dated July 25, 2003, which, inter alia, upon, in effect, determining that the petitioner's wetland permit was complete, directed an administrative hearing on the issue of whether an inspection of his property by the Department of Environmental Conservation was reasonably necessary.
>
> "Ordered that the judgment is affirmed insofar as appealed from, with costs.

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1. Reported as *In the Matter of Paul Palmieri, appellant, v. New York State Department of Environmental Conservation et al., respondents*, 2006 NY Slip Op 5793, 31 A.D.3d 645, 820 N.Y.S.2d 77, 2006 N.Y. App. Div. LEXIS 9378 under Appellate Division Docket No. 2004-5943; Suffolk County Index No. 3925/02.

"The Supreme Court, in effect, determined that the petitioner's wetlands permit application was complete. However, the fact that an application is complete does not preclude the Department of Environmental Conservation (hereinafter the DEC) from requesting supplemental information, including an on-site inspection, during the postcompletion review of an application (*see* 6 NYCRR 621.1[c]; 621.7[f]; 621.15[b]; *Matter of Benlevi Obedian & Benlevi v. New York State Dept. of Envtl. Conservation*, 144 AD2d 358, 361 [1988]; *Matter of Atlantic Cement Co. v. Williams*, 129 AD2d 84, 90 [1987]). Under the circumstances of this case, the Supreme Court properly directed an [*2] administrative hearing on the issue of whether an inspection of the petitioner's property was reasonably necessary.

"Contrary to the petitioner's contention, the Fourth Amendment to the United States Constitution does not bar a warrantless inspection of his premises (see *Palmieri v. Lynch*, 392 F3d 73 [2004], *cert denied* 546 US __, 126 S Ct 424 [2005]; *see also Vernonia School Dist. 47J Acton*, 515 US 646 [1995]; *Matter of Thompson v. Department of Envtl. Conservation of State of NY*, 132 AD2d 665 [1987]). A request by the DEC for an on-site inspection of the wetlands and adjacent areas on his property, in order to review the accuracy and impact of the petitioner's permit application, fell within the special needs exception to the Fourth Amendment's warrant requirement (*see Palmieri v. Lynch, supra*). In this instance, the state's interest in protecting wetlands is strong. Moreover, the petitioner's expectation of privacy was

diminished by the fact that his yard was open and exposed to the Great South Bay, that he applied for a permit to build in tidal wetlands, that he had previously consented to periodic inspections, and that the inspection would be a minimal intrusion (*id; see also Vernonia School Dist. 47J v. Acton, supra; Matter of Thompson v. Department of Envtl. Conservation of State of N.Y., supra*).

The petitioner's remaining contentions are without merit (*see Matter of Northern Metro. Residential Healthcare Facility, Inc. v. Novello*, 24 AD3d 1069, 1071 n 1 [2005]; *DiCarlo v. City of New York*, 286 AD2d 363, 365 [2001]; *Matter of Calm Lake Dev. v. Town Bd. of Town of Farmington*, 213 AD2d 979 [1995]). Florio, J.P., Crane, Ritter and Fisher, JJ., concur.

LEGAL ARGUMENT

The decision and order of the Appellate Division, Second Department, erroneously ruled that the Supreme Court of Suffolk County had correctly applied the 30-day limitations period contained in ECL 25-0404 when it held that petitioner's petition, filed 57 days after the determination of the Commissioner of the New York State Department of Environmental Conservation (hereafter "the DEC"), was untimely in reliance upon the case of *Matter of Oak Is. Beach Assn. v. Flacke, supra*.

Petitioner contends that the 30-day statute of limitations contained in ECL §25-0404 that was applied by the Appellate Division in the case of *Matter of Oak Is. Beach Assn. v. Flacke, supra*. should not have been applied in this

case and that the 60-day statute that is contained in ECL §15-0905 was the applicable statute to be applied in the case at bar.

The Petitioner's Article 78 Proceeding Is Not Time Barred:

Annexed as an exhibit to the petitioner's petition to the *nisi prius* court was a copy of the April 7, 2004 decision of Erin Crotty, Commissioner of the New York State Department of Environmental Conservation. The caption of that decision states as follows: "In the Matter - of- the application for a tidal wetlands permit, use and protection of water permit, and water quality certification pursuant to the Environmental Conservation Law (ECL) Articles 15 and 25, and title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) parts 608 and 661 - by- Paul Palmieri, Applicant, PERMIT APPLICATION NO. 1 - 4720 - 00666/00009".

Thus, petitioner' application was brought pursuant to both Article 25 and Article 15 of the Environmental Conservation Law ("ECL").

In the *nisi prius* court, the NYSDEC made the claim that petitioner applied for "two" permits, one a "tidal wetland permit" and the other a "use and protection of waters permit". This claim was erroneous. Petitioner applied for one permit, not two, pursuant to two articles of the Environmental Conservation Law (ECL"), Articles 15 and 25.

The *nisi prius* court, the Appellate Division and the Court of Appeals all applied the 30-day statute of limitations

for Article 78 proceedings found in ECL Section 25-0404 and ignored the 60-day statute of limitations contained in ECL Section 15-0905. As will be demonstrated, application of the 30-day statute of limitations rather than the 60-day statute of limitations to petitioner's Article 78 proceeding constituted error.

Under New York law, statutes which relate to the same subject matter must be construed together unless a contrary legislative intent is expressed (See *Dutchess County D.S.S. v. Day*, 96 N.Y.2d 149 (2001)). Courts must harmonize the various provisions of related statutes and construe them in a way that renders them internally compatible (*Id.*). Another well-established rule of statutory construction in the state of New York provides that a general statute yields to a specific or special statute" (*id.*).

ECL Section 15-0905 (the 60-day statute) applies to all proceedings before the NYSDEC that are "affected by a decision made pursuant to [Article 15]" (ECL §15-0905). Subdivision 1 of Section 15-0503, which is contained in Article 15 of the ECL, states that no "dock, pier, wharf or other structure, temporary or permanent, used as a landing place on waters, shall be erected, reconstructed or repaired . . . without a permit" [from the Department of Environmental Conservation] ". Therefore, ECL Section 15-0503 is more specific than is ECL §25-0404 (the 30-day statute of limitations) which applies to all persons "aggrieved by the issuance, denial, suspension, or revocation of a permit".

Not only is ECL §15-0503 more specific than is ECL §25-0404, it has been in existence longer and is derived from Section 32 of the Navigation Law (L. 1965, ch. 955, §9) and Section 429-c of the Conservation Law.

New York courts have consistently applied 60-day statute of limitations contained in ECL Section 15-0905 to the denial of permits to build a dock (See i.e. *Spinnenweber v. New York State Department of Environmental Conservation*, 120 A.D.2d 172 (3d Dept. 1986); *Town of Islip v. Powell*, 78 Misc.2d 1007 (Sup. Ct. Suff. Co. 1974); *Rochester Canoe Club v. Jorling*, 150 Misc.2d 321 (Sup. Ct. Mon. Co. 1991)).

Pursuant to Section 15- 0503(1)(b) the term 'reconstructed' as used in relation to docks, wharves, platforms, breakwaters, mooring or other structures Means "the substantial rebuilding of structures or facilities and shall not apply to ordinary maintenance or repair of existing functional structures or facilities, such as repainting, redriving pilings or replacing broken boards in docks".

The decision of Commissioner Crotty concludes at page 10 that "[a]pplicant has applied to the Department for the privilege of constructing a long extension to a dock in a protected tidal wetland".

Based upon the foregoing, Commissioner's April 7, 2004 decision was governed by the 60-day statute of limitations contained in Article 15 of the ECL and not by the 30-day statute contained in Article 25 of the ECL.

Section 15 - 0515 of the ECL entitled "Review" provides that "[a] determination, order or issuance, modification or denial of a permit, pursuant to Sections 15 - 0501, 15 - 0503 and 15 - 0505 shall be reviewable in a proceeding pursuant to article 78 of the Civil Practice Law and Rules".

Section 15 - 0905 of the ECL, also entitled "Review" provides in relevant part as follows:

> "1. The applicant or any person or public corporation, who or which has filed a notice of appearance in the proceedings before the department and is affected by a decision made pursuant to this article, may review such decision under the provisions of article 78 of the Civil Practice Law and rules.
>
> "2. A special proceeding for such review must be commenced within 60 days after the service in person or by mail of a copy of the decision upon the attorney of record of the applicant and of each person who has filed a notice of appearance, or to such applicant in person directly if not represented by an attorney."

Annexed to petitioner's Article 78 petition as Exhibit "A" was a letter dated April 13, 2004 from James T. McClymonds, Chief Administrative Law Judge, to petitioner's attorney enclosing a copy of the April 7, 2004 decision of Commissioner Croty. Pursuant to ECL Section 15 - 0905(2), petitioner had 60 days from the date of Mr. McClymonds letter to commence his Article 78 proceeding against the DEC and, pursuant to CPLR Rule 2103(b) (2), had an additional 5 days because the decision was mailed to petitioner's attorney. Therefore, petitioner had 65 days within which to commence his Article 78 proceeding measured from the date of mailing of the decision to petitioner's attorney.

This means that since the decision of Commissioner Crotty was mailed on April 13, 2004, excluding the date of

mailing (See New York's General Construction Law §20), petitioner's Article 78 proceeding could be commenced on or before June 17, 2004. In fact, petitioner's Article 78 proceeding was commenced on June 3, 2004 by the filing of a Notice of Petition, Petition and Exhibits, two (2) weeks short of the expiration of 65 days from the date of mailing of Commissioner Crotty's decision to the petitioner's attorney.

In *Spinnenweber v. New York State Department of Environmental Conservation, supra.*, the court ruled: "ECL 15 - 0905(1) formerly Conservation Law §432(1), provides that any person who is affected by a decision made pursuant 'to this article' may seek judicial review of such decision under the provisions of CPLR article 78. ECL 15 - 0905(2) formerly Conservation Law §432(2), provided, however, that such proceeding must be commenced within 60 days of that decision". (emphasis supplied)

The lower courts' reliance upon *Matter of Oak Beach Association, Inc. v. Flacke, supra.* is misplaced because that case concerned application of the 30-day statute of limitation contained in ECL §25-0404 to a permit to extend and widen a pier, not as in the case at bar, a permit for the construction of a dock which is expressly governed by the 60-day statute of limitations contained in ECL §15-0905.

Accordingly, such part of the respondent's motion as sought the dismissal of petitioner's petition upon the ground that it was commenced untimely should have been, in all respects, DENIED.

Petitioner Offered a Good Cause for His Delay in Serving the DEC:

The Lower Courts Should Have Exercised Their Discretion to Extend Petitioner's Time to Effectuate Service Pursuant to CPLR 306-b:

The DEC admitted at page 1 of its memorandum of law that "[t]his proceeding was initiated 57 days after the date of the Commissioner's April 7, 2004 order, by the filing of the notice of petition and petition on June 3, 2004" but claimed that, pursuant to CPLR §306-b, petitioner failed to serve the DEC within fifteen days after the expiration of the statute of limitations applicable to a challenge of the wetlands permit denial.

Pursuant to CPLR §306-b, petitioner was required to serve the DEC on or before June 21, 2004, which was the fifteenth day after expiration on June 6, 2004 of the 60 day statute of limitations.

In *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95 (2001), New York's Court of Appeals determined the standards by which a court may, "upon good cause shown or in the interest of justice" exercise its discretion to extend a plaintiff's time to effectuate service pursuant to CPLR §306-b.

In *Leader*, the Court ruled that in enacting CPLR §306-b, the Legislature gave a court two separate standards by which to measure an application for an extension of time to serve. Although the "good cause" standard encompasses "reasonably diligent efforts at service", a court may also consider any other factor in making its determination,

including length of delay in service, the promptness of a plaintiff's request for an extension of time and prejudice to the defendant, which is wholly lacking in this case.

As set forth herein, petitioner made reasonably diligent efforts to serve the DEC, the length of delay in service was minimal, petitioner promptly requested an extension of time and there was no prejudice to the DEC (*Brooklyn Housing and Family Services, Inc. v. Lynch*, 191 Misc.2d 341 (Kings Co. Sup. Ct. 2002)). Accordingly, petitioner requests that this Court exercise its discretion, reverse the lower courts and excuse any delay that may have occurred in serving the DEC with petitioner's Notice of Petition, Petition and exhibits.

Petitioner Made Reasonably Diligent Efforts to Serve; Length of Delay Was Minimal, Petitioner Promptly Requested an Extension of Time; and There Was No Prejudice to the DEC:

Personal service on a state agency such as the DEC can be made by "(1) delivering the summons to . . . the chief executive officer of such agency . . . or (2) by mailing the summons by certified mail, return receipt requested . . . to the chief executive officer of such agency, and by personal service upon the state in the manner provided by subdivision one of this section" (CPLR Section 307(2)).

CPLR Section 307(1) provides that "[p]ersonal service upon the state shall be made by delivering the summons to an assistant attorney-general at an office of the attorney - general or to the attorney - general within the state".

In accordance with CPLR Sections 307(1) and (2), on June 8, 2004, petitioner personally served the Attorney General of the State of New York with copies of his initial Article 78 Notice of Petition, Petition and Exhibits but did not serve copies upon the DEC as required by CPLR 307(2).

However, on June 24, 2004, petitioner served a copy of his Supplemental Notice of Petition[2] , together with copies of his initial Petition and Exhibits on the DEC by mailing same U.S. Express Mail, certified mail, return receipt requested, to the DEC which the DEC received on June 25, 2004; and, on June 25, 2004, served a copy of the Supplemental Notice of Petition, together with copies of his initial Petition and Exhibits on the State of New York "by personal service upon the state in the manner provided by subdivision one of this section".

On July 26, 2004, petitioner served his second Supplemental Notice of Petition dated July 15, 2004, together with copies of his initial Petition and Exhibits, upon Erin M. Crotty, Chief Executive Officer of the DEC by mailing same U.S. Express Mail, "certified mail, return receipt requested, to . . . the chief executive officer of such agency" and upon the State of New York by personal

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2 Pursuant to CPLR Rule 3025(a) petitioner was permitted to supplement his notice of petition "once without leave of court within twenty days after its service". Alternatively, CPLR Rule 3025(a) provides that petitioner could supplement his notice of petition "within twenty days after service of a pleading responding to it". Since it is a matter of record that the DEC has never served a pleading responding to petitioner's Article 78 petition, the time within which petitioner could supplement his notice of petition never even began to run.

service in the manner provided by CPLR Rule 307(1), viz. upon the Attorney General.

Therefore, the first time that the DEC was served with copies of petitioner's Notice of Petition, Petition and Exhibits was June 24, 2004. Since petitioner had until on or before June 21, 2004 to timely serve the DEC pursuant to CPLR §306-b, service upon the DEC on June 24, 2004 was a mere three days late and service on June 25, 2004 was a mere four days late.

Therefore, petitioner made diligent efforts to effectuate service upon the DEC, the length of delay in service was minimal, petitioner promptly requested an extension of time and there was no prejudice to the DEC. Consequently, the lower courts should have exercised their discretion to extend petitioner's time to effectuate service pursuant to CPLR §306-b.

The lower courts' reliance upon the cases of *Matter of Saltzman v. Board of Appeals of Vil. of Roslyn*, *supra*. and *Colon v. Bailey*, *supra*. constituted error. In *Saltzman*, the petitioners waited a year and a half before seeking an extension of time and in *Colon*, the plaintiffs eschewed due diligence by, *inter alia*, failing to produce their process server, without explanation, other than to say that he was not available, did not otherwise ask to proceed at the hearing, and instead asked for an adjournment of approximately six weeks to produce their process server.

If the lower courts' decisions and orders are permitted to stand, the body of law applicable to the 60-day statute of limitations contained in ECL Section 15-0905 which expressly applies to the denial of permits to build a dock (See

i.e. *Spinnenweber v. New York State Department of Environmental Conservation, supra.*; *Town of Islip v. Powell, supra.*; *Rochester Canoe Club v. Jorling, supra.*) will be hopelessly confused with the body of law applying ECL §25-0404 (the 30-day statute of limitations) to persons "aggrieved by the issuance, denial, suspension, or revocation of a permit".

The lower courts' decisions and orders involve a matter of public importance and involves an important question of law. The 60-day statute of limitations contained in ECL §15-0905 has never been addressed by this Court.

CONCLUSION

The petition should be granted.

Respectfully submitted,
R. Bertil Peterson
Counsel of Record
Attorney for Petitioner and
Staff Counsel for
The Coalition of Landlords,
Homeowners & Merchants, Inc.
Attorney for Petitioner
28 East Main Street
Babylon, New York 11702
(631) 376-2110

Appendix A - Decision of the Court of Appeals, State New York, Dated and Entered November 21, 2006 [1a]

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-first day of November, 2006

PRESENT, HON. JUDITH KAYE, *Chief Judge, presiding*

2-10 Mo. No. 1023

In the Matter of Paul Palmieri,
Appellant,
v.
New York State Department of Environmental Conservation,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

S/_____
Stuart M. Cohen
Clerk of the Court

Appendix B - Decision of the Appellate Division, Second Department, State of New York, Dated and Entered July 18, 2006 [2a - 4a]

APPELLATE DIVISION
SECOND DEPARTMENT

In the Matter of Paul Palmieri,
Appellant,

v.

New York State Department of
Environmental Conservation,
Respondents.

Docket No. 2005 - 2686

Suffolk Co. Index No. 13500/04
2006 NY Slip Op 5794; 31 A.D.3d 647
819 N.Y.S.2d 76, 2006 N.Y. App. Div. *LEXIS* 9379

In a proceeding pursuant to CPLR article 78 to review a determination of the New York State Department of Environmental Conservation that an on-site inspection of the wetlands and adjacent areas on the petitioner's property was reasonably necessary for the review of his application for a permit to extend his dock pursuant to Environmental Conservation Law articles 15 and 25, and that his application was denied unless and until he allowed the inspection, the petitioner appeals, as limited by his brief, from so much of an order and judgment (one paper) of the Supreme Court, Suffolk County (Baisley.), dated January 5, 2005, as granted that branch of the respondent's motion which was to dismiss

the petition as time-barred, denied that branch of his cross-motion which was for leave to extend the time to personally serve the respondent, and dismissed he proceeding.

ORDERED that the order and judgment is affirmed insofar as appealed from, with costs.

Contrary to the petitioner's contention, the Supreme Court properly dismissed the petition as time-barred. The Supreme Court correctly applied the 30-day limitations period in ECL 25-0404 and held that the petition, filed 57 days after the determination of the Commissioner of the State of New York Department of Environmental Conservation (hereinafter the DEC), was untimely (see *Matter of Oak Is. Beach Assn. v. Flacke*, 96 A.D.2d 841, 465 N.Y.S.2d 596).

Furthermore, the petitioner offered no good cause for his delay in serving the DEC, and that branch of his cross motion which was for leave to extend the time for service was made over three months after his first attempt at service. Accordingly, the Supreme Court providently exercised its discretion in denying that branch of the cross motion (see *Matter of Saltzman v. Board of Appeals of Vil. of Roslyn*, 26 A.D.3d 505, 506, 811 N.Y.S.2d 99; *Colon v. Bailey*, 26 A.D.3d 454, 455-456, 810 N.Y.S.2d 511).

Appendix B
[Decision of the Appellate Division, Second Department, State of New York, Dated and Entered July 18, 2006]

In light of our determination, we need not reach the petitioner's remaining contentions. FLORIO, J.P., CRANE, RITTER and FISHER, JJ., concur.

Appendix C - Order of Supreme Court, State of New York, County of Suffolk, Dated and Filed January 5, 2005 [5a - 9a]

SHORT FORM ORDER INDEX NO. 04-13500

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 36 - SUFFOLK COUNTY

PRESENT:

Hon. PAUL J. BAISLEY, JR.
Justice of the Supreme Court

MOTION DATE 6-3-04 (#001 & 002)
10-07-04 (#003 & 004)
ADJ. DATE 10-14-04
Mot. Seq.#001- CASEDISP
002- MG
003-MD
004-XMD

----------X

PAUL PALMIERI,

Petitioner,

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondent.

----------X

Appendix C
[Order of Supreme Court, State of New York, County of Suffolk, Dated and Filed January 5, 2005]

R. BERTIL PETERSON, ESQ.
Attorney for the Petitioner
28 East Main Street
Babylon, New York 11702

ELIOT SPITZER, ESQ.
Attorney General for the
State of New York
By: Gregory J. Nolan, Esq.
120 Broadway, 26th Floor
New York, New York 10271-0332

Upon the following papers numbered 1 to 39 read on this Article 78 proceeding and motions to dismiss and cross motion to extend time to serve petition; Notice of Petition/Petition and supporting papers 1- 11; Motion and supporting papers 12- 17; 18- 22; 23- 28; Answering Affidavits and supporting papers 29- 33; Replying Affidavits and supporting papers 34- 39; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 002) by respondent New York State Department of Environmental Conservation for a dismissal of the petition (motion sequence no. 001) on the basis that the proceeding was untimely commenced and for lack of personal jurisdiction is granted to the extent that the proceeding is dismissed as time barred; and it is further

[Order of Supreme Court, State of New York, County of Suffolk, Dated and Filed January 5, 2005]

ORDERED that the motion (motion sequence no. 003) by respondent New York State Department of Environmental Conservation for a dismissal of the petitioner's supplemental notice and petition is denied as moot; and it is further

ORDERED that the cross-motion (motion sequence no. 004) by petitioner for leave to extend the time to personally serve respondent New York State Department of Environmental Conservation in accordance with CPLR Section 306-b is denied as moot.

In this Article 78 proceeding petitioner seeks a judgment annulling and reversing a determination by the Commissioner of the respondent New York State Department of Environmental Conservation (NYSDEC) adopting the recommendation of an Administrative Law Judge, made after an adjudicatory hearing, that petitioner failed to meet his burden of demonstrating that the NYSDEC's request for an on-site inspection of petitioner's real property was not reasonable and necessary to evaluate his application for a tidal wetlands permit and that petitioner's failure to allow such inspection necessitated the denial of his permit application. The adjudicatory hearing was conduced at the direction of this Court by its decision, dated May 5, 2003 (Baisley, J.), in a prior Article 78 proceeding commenced be petitioner after the NYSDEC declared his tidal wetlands permit incomplete because he had

declined to allow the NYSDEC to conduct an on-site inspection of his property.[1]

Respondent NYSDEC now moves to dismiss the petition on the basis that the proceeding was untimely commenced. Pursuant to ECL Section 25-0404, any person aggrieved by the denial of a tidal wetlands permit may within thirty (30) days from the date of the commissioner's order seek judicial review pursuant to CPLR Article 78. The thirty-day period runs from the date of the order, not its service (***Oak Island Beach Ass'n v. Flecke*** [sic.], 96 AD2d 841, 465 NYS2d 596 [1983] app den 62 NY2d 606, 482 NYS2d 1023).

Since the Commissioner's order is dated April 7, 2004, and the petition herein was not filed until 57 days later, on June 3, 2004, the proceeding was not timely commenced (*see* ***Obedian v. New York State Department of Environmental Conservation***, 108 AD2d 749, 485 NYS2d 98 [1985]). Petitioner's attempt to re-characterize the petition as one seeking judicial review in accordance with ECL 15-0515, which would thus entitle the proceeding to the sixty-day period of limitations provided for such proceedings, is without merit. The administrative law judge, the Commissioner and the petitioner himself all clearly referred to and treated petitioner's permit application as one

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1 The Article 78 proceeding was entitled *Palmieri v. New York State Department of Environmental Conservation*, and was filed under Suffolk County Index No. 02-3925.

for a tidal wetlands permit under Title 25 of the Environmental Conservation Law.[2] Respondent NYSDEC's motion to dismiss the petition is therefore granted. Respondent NYSDEC's additional motion to dismiss the petitioner's supplemental notice of petition and petition and petitioner's cross-motion for leave to extend the time to personally serve respondent NYSDEC are both denied, as moot.

Accordingly, the proceeding is dismissed.

Dated: January 5, 2005 S/_____
J.S.C.

X **FINAL DISPOSITION** __ **NON-FINAL DISPOSITION**

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2 The Court acknowledges that petitioner would also be required to obtain a permit under Title 5 of Article 15 (Protection of Waters) of the ECL for his proposed dock. Nevertheless, in the absence of a tidal wetlands permit he may not build that dock.

Appendix D - Memorandum Decision of Supreme Court, State of New York, County of Suffolk, Dated and Filed May 5, 2003 [10a - 21a]

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY I.A.S. PART 36

Paul Palmieri,	By: Baisley, J.S.C.
Petitioner,	Dated: May 5, 2003
v.	Index No. 02-3925
New York State Department of Environmental Conservation; ERIN M. CROTTY, Commissioner; and MOLLY T. McBRIDE, Administrative Law Judge,	Mot. Seq. #001-SDISPSJ Return Date: 4-3-02 Adjourned: 1-16-03
Respondents.	

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ELIOT SPITZER, ESQ.
New York State Attorney General
By: Gregory J. Nolan, Esq.
120 Broadway, 26th Floor
New York, New York 10271-0332

Appendix D

[Memorandum Decision of Supreme Court, State of New York, County of Suffolk, Dated and Filed May 5, 2003]

This Article 78 proceeding arises out of respondent's denial of petitioner's application for a tidal wetland permit. The petitioner owns property located in Babylon, New York which adjoins the Great South Bay. The property is improved by the petitioner's house and backyard fencing. The rear of the property, which is adjacent to the water, is improved with a bulkhead, a 92 foot long dock extending outward from the bulkhead and three boat lifts.

In 1991 the petitioner applied for and was granted tidal wetlands permits for the reconstruction of a bulkhead and construction of a 30 foot by 10 foot ramp, a 5 foot by 45 foot float and pilings and a 52 foot fixed pier with additional pilings and two boat lifts. Following construction of these improvements and in January of 1993, the petitioner applied for another tidal wetlands permit to extend the existing 52 foot dock an additional 110 feet and to add two more boat lifts. This application was denied by the respondent, the New York State Department of Environmental Conservation (NYSDEC), on November 4, 1993. Following the petitioner's request for an administrative hearing, a settlement was reached wherein it was greed that a permit would be issued for a dock extension of 40 feet and for construction of an additional boat lift (Administrative Record, pages 22-23).

The petitioner submitted the current application for a tidal wetlands permit in May of 1999. He sought to extend the existing 92 foot dock by 50 feet and to add another boat lift. By a NOTICE OF INCOMPLETE APPLICATION

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[Memorandum Decision of Supreme Court, State of New York, County of Suffolk, Dated and Filed May 5, 2003]

(Incomplete Notice) dated July 13, 1999, NYSDEC informed the petitioner that his application was incomplete in that he was required to submit photographs, project plans, a location map, a recent survey, proof that the proposed dock extension and boat lift were reasonable and necessary and information as to how many boats would be moored (Administrative Record, page 56). The petitioner was served with a second "Notice of Incomplete Application" (Second Incomplete Notice) which indicated that his application was still designated as incomplete as he had failed to submit a recent survey of the project site (Administrative Record, page 64). By letter dated April 7, 2000, NYSDEC informed the petitioner that his application was complete except for an on-site inspection. Following petitioner's continued refusal to allow NYSDEC to conduct an on-site inspection, NYSDEC denied the permit application by "Notice of Permit Denial" (Notice of Denial), dated July 7, 2000. NYSDEC denied the application on the ground that the petitioner failed to allow NYSDEC to conduct an on-site inspection of the property. The Notice of Denial further informed the petitioner that he had a right to a public hearing pursuant to NYCRR 621.7(f). Subsequently, the petitioner requested a hearing on the denial of the permit.[1] The hearing, which was initially scheduled for March 21, 2001, was adjourned to June 25, 2001 because of NYSDEC staff unavailability. Neither the petitioner nor his attorney appeared at the adjourned hearing.

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1. In NYSDEC's request for a hearing, it indicated that a Notice of Complete Application was not required since the proposed activity was classified as a minor project.

Appendix D
[Memorandum Decision of Supreme Court, State of New York, County of Suffolk, Dated and Filed May 5, 2003]

NYSDEC then moved for administrative judicial intervention. On the motion NYSDEC contended that the petitioner's failure to appear at the re-scheduled hearing should be considered as an abandonment or withdrawal of the request for a hearing or a default. NYSDEC contended alternatively, that NYSDEC's denial of the permit application should be affirmed without the need for an adjudicatory hearing on the ground that controlling administrative case law precludes a hearing until petitioner consents to an on site inspection. Petitioner opposed the motion on the grounds that NYSDEC failed to confirm the adjourned hearing date and to provide proof of publication of the notice of hearing.[2]

An undated decision was rendered on the petitioner's motion by Administrative Law Judge Molly McBride (ALJ, the "McBride Ruling"). Initially, the ALJ determined that there was no confirmation that petitioner's attorney saw the notice of the adjourned hearing. The ALJ further determined "Frankly, scheduling errors occur and such a sever penalty as requested by Staff [NYSDEC] is not warranted here" (Administrative Record, page 7). With regard to NYSDEC's

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2. Petitioner's attorney, in a letter dated April 27, 2000, contended that NYSDEC could conduct a review of the permit application in a manner less intrusive than an on-site inspection, particularly where there is an alternative method of inspection such as from a waterway. Petitioner's attorney further contended that a non-consensual on-site inspection was tantamount to an illegal warrantless search.

alternate request for relief, the ALJ determined that NYSDEC could not determine whether the application met the standards for permit issuance without conducting an on-site inspection. The ALJ decided that if it cannot be determined whether the standards have been met, then the application cannot be deemed complete. The ALJ recommended that the Notice of Denial be vacated and replaced with a Notice of Incomplete Application. The ALJ further recommended that the petitioner's request for a hearing be treated as void since such a request could not be made in response to a Notice of Incomplete Application. The ALJ concluded that there could be no further processing of the petitioner's application until it was complete.

In a Ruling dated February 1, 2002, the respondent Erin M. Crotty as the Commissioner of NYSDEC, adopted the decision of the ALJ (the Commissioner's Ruling). The Commissioner commented in the Ruling:

> "I find that the Applicant's tidal wetlands application under review must be deemed incomplete for the purposes of permit processing under the Department's Uniform Procedures, 6 NYCRR part 621. The Applicant's denial of access to his property prevented Department Staff from evaluating the on-site conditions and the proposed project. The ability to gather such information is necessary to make the determination that the permit application is complete. The Applicant's actions effectively relieves Department Staff from taking any further action on

> the permit application until access to the site and site information is available for Staffs review. Further, I am determining that the Applicant's request for hearing on its proposed project is void until such time as the site access and the necessary information is made part of the permit application. Thereafter, if and when said information is supplied and Staffs redetermination is to deny the proposed project, then the Applicant will be afforded a hearing on Staffs denial of the requested permit" (Administrative Record, pages 2 to 3).

Petitioner then commenced this special proceeding by service of a notice of petition and verified petition. Petitioner subsequently served an amended verified petition. Petitioner seeks in the amended petition a judgment annulling and vacating the Commissioner's ruling to the extent it affirms those portions of the McBride ruling determining that the petitioner's application was incomplete and that the petitioner's request for a hearing was void. Petitioner also seeks a review of the McBride Ruling. Petitioner contends that: (i) pursuant to 6 NYCRR 621.4(k), an on-site inspection by a NYSDEC staff member is not one of the requirements for a complete permit,[3] (ii) the McBride decision violates the provisions of ECL 70-0109(1)(a)(b) and 6 NYCRR 621.5(b) which deem an application complete

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3. Petitioner avers that he has no objection to an on-site inspection by a private environmental consultant pursuant to 6 NYCRR 621.4(k)(iii).

unless NYSDEC mails a Written [sic.] notice that the application is incomplete within 15 calendar days, (iii) the ALJ in the McBride Ruling improperly relied on an Interim Decision of the Deputy Commissioner of NYSDEC, dated November 6, 2000 (the *Bath Storage* decision) in holding that an adjudicatory hearing is not available for review of a permit denial based on the incompleteness of the application, and (iv) NYSDEC's attempt to enforce a non-consensual, warrantless site inspection violates petitioner's right against unreasonable search and seizure under the Fourth Amendment of the United States Constitution. Petitioner further contends that his property does not come wthin NYSDEC's wetland permit jurisdiction pursuant to ECL 0505(1) and 6 NYCRR 608.5.[4]

Petitioner's claim that NYSDEC lacked jurisdiction to either grant or deny a tidal wetlands permit for the petitioner's project is considered first. Article 25 of the

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4. Petitioner's attorney also contended in the reply affirmation that the permit application should be deemed approved on the basis of the five day demand provisions of 6 NYCRR 621.9(b)(c). The Court did not consider this contention since the issue was not raised at the administrative level (*Ambry v. Bd. of Trs. of N.Y. City Fire Dep't*, 298 A.D.2d 582, 748 N.Y.S.2d 681 [2002]). The cases cited by the petitioner to the contrary are inapposite since this issue does not relate to whether the Court has subject matter jurisdiction over this Article 78 proceeding (Cf, *Fry v. Village of Tarrytown*, 89 NY2d 714, 658 N.Y.S.2d 205 (19971) (sic.).

Appendix D
[Memorandum Decision of Supreme Court, State of New York, County of Suffolk, Dated and Filed May 5, 2003]

Environmental Conservation Law (Tidal Wetlands Act) was enacted as an expression of the State's public policy "to preserve and protect tidal wetlands. . . " (ECL 25-0102). Although the provisions of ECL 0505(1) and 6 NYCRR 608.5 acknowledge the Towns' control over the wetlands in the Counties of Nassau and Suffolk, these provisions should not be interpreted to preclude joint control over the issuance of wetland permits by the respective governmental entities (*see, Huntington v. Albicocco*, 66 AD2d 886, 411 NYS2d 675 [1978]). The provisions of Article 25 specifically state that the tidal wetland permits issued by NYSDEC shall be in addition to, and not in lieu of, any such permits required by the affected local municipality (ECL 25-0401(1); Weinberg, Practice Commentaries, McKinney's Cons Laws of NY, Book 17 1/2, ECL Section 25-0401, p. 433; *see*, 6 NYCRR 661.3).

Petitioner's contention that NYSDEC's attempt to enforce a non-consensual site inspection of his property violates his constitutional rights is also without merit. Where NYSDEC can demonstrate a reasonable need for the scientific information obtained by an on-site inspection, such inspections may be valid criteria for a wetlands permit (*Thompson v. Department of Environmental Conservation*, 132 AD2d 665, 518 NYS2d 36 [19871 [sic.] app. den. 71 NY2d 803, 527 NYS2d 769; *see*, 6 NYCRR 621.15(b)). The cases cited by the petitioner (*see Stender v. Albany*, 188 AD2d 986, 592 NYS2d 70, 547 NYS2d 68 [1992], app. dis. 81 NY2d 1006, 599 NYS2d 805; *Brookhaven v. Ronkoma* [sic.] *Realty Corp.*, 154 AD2d 665, [19891) [sic.] are

inapposite in that an on-site inspection is a minimal intrusion and petitioner's project poses a diminished expectation of privacy and as well is a matter of significant governmental interest (ECL 25-0102; 6 NYCRR 661.1, 661.9(b)(1); see *Bd of Educ. v. Earls*, 536 US 822, 829, 122 S Ct 2559, 153 L Ed 2d 735 [2002]).

Petitioner's other contentions in effect challenge that part of the Commissioner's Ruling that NYSDEC is relieved from any further action including a hearing on the petitioner's application until he complies with its demand for an on-site inspection. In reaching this determination the Commissioner adopted the McBride Ruling as his own. Accordingly, in order to determine the efficacy of the Commissioner's Ruling, the court must review the findings in the McBride Ruling.

The record establishes that initially NYSDEC afforded the petitioner the right to a public adjudicatory hearing in the Notice of Denial. This hearing was adjourned because of NYSDEC's inability to proceed. Although neither the petitioner nor his attorney appeared at the adjourned date of the hearing, the ALJ subsequently determined that petitioner should not be deprived of his right to a hearing on this ground. The ALJ, by characterizing the petitioner's application as incomplete, determined that no further action, including the adjudicatory hearing, could be taken. The Court finds that this was error and petitioner should have been afforded the opportunity at an adjudicatory

hearing to demonstrate whether NYSDEC's request for an on-site inspection was reasonable and necessary.[5]

Following petitioner's submission of his tidal wetlands permit, he was served with the Incomplete Notices which did not require an on-site inspection. The requirements for a complete application are listed in 6 NYCRR 661.12(a)(1), 6 NYCRR 621.3 and under the circumstances of this case, also in 6 NYCRR 621.4(k). Although these sections do not specifically provide for an on-site inspection as a prerequisite for a complete application, NYSDEC has the general authority to request supplemental information during the course of permit review to enable it [to] make the findings and determinations required by law (6 NYCRR 621.1(d)). NYSDEC may also request during the permit review process additional information "which is *reasonably necessary* to make any findings or determinations required by law" (6 NYCRR 621.15(b), emphasis added). NYSDEC may fix a date for receipt of the additional information and if the information is

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5. The ALJ found that NYSDEC could not determine if the petitioner's application met the standards for permit issuance without an on-site inspection. This finding was premature, not having been based on evidence adduced in an adjudicatory hearing.

not timely submitted it "may be grounds for *denial* of the application" (6 NYCRR 621.15(b), emphasis added).[6]

Here petitioner's application was denied on the ground that without a site inspection NYSDEC could not determine whether or not the petitioner's proposal complied with the standards for permit issuance. Petitioner, upon his request pursuant to 6 NYCRR 621.7(f), was entitled to an adjudicatory hearing on whether or not NYSDEC's demand for an on-site inspection was reasonably necessary to make the required findings or determinations with regard to the petitioner's permit application. The ALJ's reliance on the *Bath Storage* decision is misplaced. the Deputy Commissioner in *Bath Storage* noted:

> "There may be times when an application is determined to be complete by Staff but after further review, Staff requests additional information in accordance with 6 NYCRR 621.15(b). In some of these instances, adjudication might proceed on points of dispute where a *reasonable interpretation* indicates that supplemental information is necessary

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6. NYSDEC, in its memorandum of law in opposition to the petition, requests that "should the DEC's action not be found to be a non-reviewable determination that Palmieri's permit application is incomplete, it should be viewed as a denial of the application on the ground that Palmieri failed to meet his burden of establishing that his proposed project meets all applicable regulatory standards" (pages 17-18).

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[Memorandum Decision of Supreme Court, State of New York, County of Suffolk, Dated and Filed May 5, 2003]

> to complete staff's review. Such is not the case in this proceeding" (amended verified petition, Exhibit G, page 5, emphasis added).

In the case at bar NYSDEC had determined that petitioner's application was complete except for information to be derived from an on-site inspection which NYSDEC believed was reasonably necessary for its review of the petitioner's permit. Requiring an adjudicatory hearing on this issue would not, as the Deputy Commissioner opined in *Bath Storage*, turn "the permitting process on its head."

Accordingly, this petition is granted to the extent that petitioner is held to be entitled to an adjudicatory hearing pursuant to 6 NYCRR 621.7(f), and is otherwise denied. Petitioner shall have the burden at such hearing of demonstrating that NYSDEC's demand for an on-site inspection of the petitioner's property is not reasonably necessary in order to evaluate the petitioner's application for a wetlands permit (6 NYCRR 624.9(b)(1)).

Settle judgment on five days' notice.

PAUL J. BAISLEY, JR.
J.S.C.

Appendix E - Decision of the Commissioner, State of New York, Department of Environmental Conservation, Dated and Filed April 7, 2004 [22a - 33a]

STATE OF NEW YORK DEPARTMENT
OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

-of-

the application for a tidal wetlands permit, use and protection of water permit, and water quality certification pursuant to the Environmental Conservation Law (ECL) articles 15 and 25, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Parts 608 and 661

-by

PAUL PALMIERI

Applicant.

PERMIT APPLICATION No. 1-4720-00666/00009

DECISION OF THE COMMISSIONER

April 7, 2004

Appendix E
[Decision of the Commissioner, State of New York, Department of Environmental Conservation, Dated and Filed April 7, 2004]

DECISION OF THE COMMISSIONER

The attached hearing report, except for the section headed "Recommendation," of Administrative Law Judge ("ALJ") Molly T. McBride in the matter of the application of Paul Palmieri for a tidal wetlands permit, protection of waters permit, and water quality certification is hereby adopted as the decision in this matter subject to the following additional findings and conclusions.

This matter is before the Department of Environmental Conservation ("Department") pursuant to an order of Supreme Court, Suffolk County (see Matter of Palmieri v. New York State Dept. of Envtl. Conservation, Sup Ct, Suffolk County, May 5, 2003, Baisley, J., Index No. 02-3925). In that order, Supreme Court remanded the matter to the Department to afford applicant Paul Palmieri an adjudicatory hearing on the issue of whether Department staff's demand for an on-site inspection of applicant's property is reasonably necessary in order to evaluate applicant's application for a tidal wetlands permit (see id. at 6). The court placed the burden upon applicant to demonstrate that the Department's demand is not reasonably necessary in order to evaluate his application (see id.).

The hearing record demonstrates that applicant failed to meet his burden of proof that Department staff's request to inspect the project site from applicant's property is not reasonably necessary. Accordingly, for the reasons stated in

the hearing report and in this decision, I affirm Department staff's denial of the permit application.

Discussion

As an initial matter, it is important to note the narrow scope of the issue remanded for hearing by Supreme Court, Applicant devotes significant portions of his post-hearing brief to the ALJ to the argument that Department staff's demand for a pre-permit inspection on applicant's property to evaluate his wetlands permit application constitutes an unreasonable intrusion and unconstitutional search in violation of the Fourth Amendment of the United States Constitution, and an illegal trespass under New York law. In its order in the CPLR article 78 proceeding initiated by applicant, however, Supreme Court expressly rejected these arguments. The court held:

> "[Applicant's] contention that NYSDEC's attempt to enforce a non-consensual site inspection of his property violates his constitutional rights is also without merit. Where NYSDEC can demonstrate a reasonable need for the scientific information obtained by an on-site inspection, such inspections may be valid criteria for a wetlands permit . . . The cases cited by the petitioner . . . are inapposite in that an on-site inspection is a minimal intrusion and petitioner's project poses a diminished expectation of

privacy and as well is a matter of significant governmental interest"

(id. at 4-5 [citations omitted]; see also Palmieri v. Lynch, US Dist Ct, Ed NY, Aug. 29, 2003, Seybert, J., 00-CV-3225 [dismissing similar claims under federal law that the Department's on-site inspection violated applicant's 4th Amendment rights]).

The court also expressly recognized that the Department has the authority to request during the permit review process additional information that is "reasonably necessary" to make any findings or determinations required by law in connection with the permit application, and that an applicant's failure to provide such information may be grounds for denial of an application (see id. at 5 [citing 6 NYCRR 621.1(d) and 621.15(b)]). Thus, applicant's arguments under federal and state law were rejected by Supreme Court, and are not presently before the Department on this remand.

Accordingly, the narrow issue presented for hearing is whether Department staffs demand for an on-site inspection complied with the regulatory requirement of 6 NYCRR 621.15(b), that is whether the demand was "reasonably necessary" to make the required findings or determinations with regard to applicant's tidal wetlands permit application (see id. at 6). As noted above, Supreme Court expressly placed the burden of proof on applicant (see

id. [citing 6 NYCRR 624.9(b)(1)]). The regulations applicable to permit hearing procedures establish that the party bearing the burden of proof must sustain that burden by a preponderance of the evidence unless a higher standard has been established by statute or regulation (see 6 NYCRR 624.9[c]).

Review of the hearing record reveals that applicant failed to carry his burden of proof. A preponderance of the credible evidence presented at the hearing establishes that on-site inspections by Department staff are reasonably necessary to evaluate tidal wetland permit applications, and to determine whether statutory and regulatory standards for permit issuance can be met [see Environmental Conservation Law 25-0402 & 25-0403, and 6 NYCRR 661.9(b)].

On-site inspections are reasonably necessary to allow the Department to most efficiently and effectively carry out its statutory and regulatory obligations. The record demonstrates that, due to the high volume of permit applications filed with the Department's Region 1 office, the limited number of available inspectors must conduct numerous tidal wetland permit application inspections per day in an area covering both Nassau and Suffolk Counties.

Department staff's witness testified that on-site inspections are important in order to obtain the environmental information necessary for the evaluation of a tidal wetlands permit application with respect to the

applicable statutory and regulatory criteria. As testified, such on-site inspections provide significant information, including, for example, information on the upland topography, the extent and types of vegetated areas, the values of upland areas as buffers, existing structures, and drainage patterns.

Department staff's witness noted that on-site inspections afford a comprehensive view of the shoreline and upland areas. From the vantage point of the height of the bulkhead, it provides an opportunity to observe, among other things, water flow patterns and te condition of the areas seaward from the bulkhead.

Moreover, a preponderance of the credible evidence demonstrates that the Department had a reasonable need for the environmental information that wold have been obtained by an on-site inspection in this particular case. Review of applicant's permit application materials submitted in 1991, 1993, and 1999, respectively, suggest that the underwater area under applicant's dock may be subject to significant sedimentation and accretion. Thus, applicant's own application materials revealed that a significant degree of sedimentation or accretion was underway in the shoals, mud flats, and littoral zone just seaward of applicant's property that required evaluation before a permit could be issued.

Appendix E
[Decision of the Commissioner, State of New York, Department of Environmental Conservation, Dated and Filed April 7, 2004]

Staff's witness provided detailed reasons why access to the upland area of applicant's property was necessary, including to confirm that accretion was occurring and, if so, to evaluate its source. He testified that an upland inspection on applicant's property would include, for example, determining the sources and nature of run off from the property, inspecting the condition of the landward side of the bulkhead, and inspecting the shoreline adjacent to the property from a vantage point that allowed a comprehensive view.

Staff's witness also indicated that the best vantage point for assessing water quality and the condition of the shoals and mud flats seaward of the bulkhead was from the bulkhead itself, and that walking out on applicant's dock would provide a more effective means of observing underwater vegetation growth in the vicinity of the dock.

Applicant did not challenge staff's assertion that an assessment of the upland area of the project site was a necessary part of the permit application review. Rather, applicant's contention at hearing was that staff could access the project site either by boat or along the shoreline, and could conduct the inspection from either of those two routes without crossing or stepping foot on applicant's property.

The weight of the record evidence demonstrates that both alternatives suggested by applicant would provide a much less effective means for conducting the appropriate

inspection, both upland and in the water itself. In addition, the two alternatives are impracticable, more costly, time consuming, and wasteful of limited Departmental resources.[1] With respect to an inspection by boat, the record indicates that boats appropriate for use in the waters adjacent to applicant's project are not available to Department staff that review tidal wetlands permit application review.[2]

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1 Use of a boat, practically and as a matter of Department policy, requires at least two staff members in order to both operate the boat and conduct the inspection. The record clearly establishes that inspections conducted during routine, high-volume review of tidal wetland applications are usually conducted by one inspector from land.

2 Applicant introduced a list of boats (see Exh C) that are utilized by the Department, and argued that a Department-owned sixteen-foot Boston whaler was available to staff to use. Applicant did not establish by a preponderance of the evidence that the Boston whaler was available to staff to use.

More importantly, the record indicates that inspection of the upland area, the shoreline, and the relevant underwater areas would be less effective and significantly hindered if it had to be conducted from a boat rather than from applicant's property. Staff's witness testified that inspection by boat, due to safety considerations, would best be conducted during high tide, a condition less favorable to effective inspection of underwater shoals and mud flats, and where projects involving a dock are concerned.

Applicant referred to staff using a boat in 1995 to visit off-shore around his dock following the Department's denial of a prior permit application. This does not compel the conclusion that access to applicant's property is not reasonably necessary to evaluate applicant's 1999 permit application. To the contrary, the circumstances surrounding staff's use of a boat at that time demonstrates such use is atypical and out of the ordinary.[3]

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3 Applicant contends that staff also visited his site in 1991 by boat. This contention was not corroborated and, thus, the contention was not established by the preponderance of the evidence. Moreover, the record is entirely silent concerning the circumstances surrounding the 1991 visit, assuming it occurred by boat.

Appendix E
[Decision of the Commissioner, State of New York, Department of Environmental Conservation, Dated and Filed April 7, 2004]

As the record demonstrates, significant obstacles and costs are associated with applicant's second offered alternative of an inspection from the shoreline. applicant failed to establish that access to the shoreline from a public location was generally known. Moreover, applicant failed to establish that use of the shoreline would be a safe mens of gaining access to the project site. At most, applicant's witness established that the shoreline was rocky and sandy, but did not otherwise establish its condition. In contract, Department staff's witness noted potential hazards associated with walking along similar shorelines, including the difficulty of walking over algae-covered rocks and the presence of sinkhole-like features under the water.

Applicant also failed to indicate the height of the bulkhead or otherwise establish the bulkhead would not effectively block the view of the upland area and the area landward of the bulkhead to a viewer standing on the shoreline (or a viewer from a boat). To the contrary, staff's witness testified that bulkheads in the area are generally about six feet high.

Photographs entered into evidence by the applicant are the only record evidence of the actual height of the bulkhead in this case (see Exhs F, G, and H). Those photographs suggest that the bulkhead is taller than an adult male, and support the reasonable inference that the view of the upland area would be significantly blocked to an inspector of average height standing on the shoreline. In any

event, applicant fails to establish, by a preponderance of the evidence, that such an inspector could effectively conduct the necessary inspection of the upland area from the shoreline or from a boat.

Conclusion

The hearing record demonstrates that applicant failed to carry his burden of establishing, by a preponderance of the evidence, that staff's demand to conduct an on-site inspection was not reasonably necessary to make the required permit application. The weight of the record evidence supports the conclusion that such access was reasonably necessary, and that applicant's two proposed alternatives to on-site inspection would impose an unreasonable burden upon the limited resources of the Department and significantly hinder the necessary environmental assessments required to determine whether applicant's application meets with statutory and regulatory criteria.

Applicant has applied to the Department for the privilege of constructing a long extension to a dock in a State-protected tidal wetland. Because staff's request during the permit application review process for an on-site inspection was reasonably necessary to make the findings and determinations required by law, applicant's refusal to allow the on-site inspection is ground for denial of the 1999 permit application. Therefore, Department staff's

determination to deny the 1999 permit application is affirmed.

For the New York State
Department of Environmental
Conservation

S/_____
By: Erin M. Crotty, Commissioner

Dated: April 7, 2004
Albany, New York

Appendix F - Hearing Report of Administrative Law Judge Molly T. McBride Dated and Filed January 30, 2004 [34a- 46a]

STATE OF NEW YORK DEPARTMENT
OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

-of-

the application for a tidal wetlands permit, use and protection of water permit, and water quality certificate pursuant to the Environmental Conservation Law (ECL) Articles 15 and 25, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Parts 608 and 661 by

PAUL PALMIERI

PERMIT APPLICATION No. 1-4720-00666/00009

HEARING REPORT

-by-

Molly T. McBride
Administrative Law Judge
January 30, 2004

Appendix F
[Hearing Report of Administrative Law Judge Molly T. McBride Dated and Filed January 30, 2004]

PROCEEDINGS

In May 1999, an application for permits from the New York State Department of Environmental Conservation (Department) was made by Paul Palmieri (applicant), 123 East Shore Road, Babylon, New York, for a tidal wetlands permit, protection of waters permit and water quality certificate pursuant to ECL Article 25 and 6 NYCRR 661. The application was denied on July 7, 2000 and applicant requested an adjudicatory hearing. A hearing was scheduled for March 27, 2001 but was adjourned due to the unavailability of Staff's witness. The hearing was rescheduled for June 25, 2001. Applicant failed to appear for the hearing. Department Staff served a notice of motion for administrative judicial intervention on or about June 28, 2001 asking that the permit application be denied due to applicant's failure to appear at the hearing. Applicant opposed the motion. Department Staff had also moved for an order affirming its denial of the application due to applicant's refusal to allow Staff to conduct a site visit as part of the permit review process.

The motion was denied with regard to applicant's failure to appear for the hearing. By order of Commissioner Erin M. Crotty dated February 1, 2002, the application was deemed incomplete due to Department Staff's inability to enter the property for a site inspection and the hearing request was deemed void. Applicant commenced a proceeding in New York State Supreme Court pursuant to Article 78 of New York Civil Practice Law and Rules

Appendix F
[Hearing Report of Administrative Law Judge Molly T. McBride Dated and Filed January 30, 2004]

(CPLR) challenging the Commissioner's order. Supreme Court, Suffolk County, by order of Justice Paul Paisley, Jr. dated May 5, 2003, remanded the matter to the Department for a hearing on the sole issue of whether an on-site inspection by Department Staff, as part of the permit application review, was reasonably necessary.

BACKGROUND

This applicant has a history of filing permit applications with the Department for projects at this site. In 1991 applicant applied for a permit to reconstruct a bulkhead and to construct a 30' x 10' ramp and a 5' x 45' float and pilings. The permit was issued. Approximately 5 months later, applicant applied for a permit to construct a 52' fixed pier with additional pilings. This application was also granted. In 1993, one year after the second permit was issued, applicant sought to expand the existing 52' pier an additional 110', to add 2 boat lifts with 80,000 lb. and 16,000 lb. capabilities and to add 4 mooring pilings clusters. Staff denied this application. A hearing was requested by applicant after the denial. The parties entered into settlement discussions. During these discussions, a site visit was done by Department Staff via boat. Ultimately, the parties resolved the matter and a Stipulation of Settlement was entered into on May 30, 1995 wherein applicant agreed to modify the application and reduce the extension of the boat dock from 110' to 40' and to reduce the boat lift request from two boat lifts to one boat lift. Based upon the changes made to the application as a result of the settlement, Staff withdrew

its objections to the issuance of the permit and a permit was issued in June 1995.

In May 1999 applicant applied for a permit to construct an additional 50' extension of the dock and to add an 80,000 lb. boat lift. This is basically what was requested by applicant in his 1993 application, when combined with what was permitted in June 1995.

The May 1999 application was denied by Staff by letter dated July 7, 2000. The Notice of Permit Denial states, in part: "You failed to allow Department Staff to inspect the property to observe the conditions at the site in order to determine whether or not your proposal complies with the standards for permit issuance. Therefore, this application for permit is hereby denied." It is undisputed that applicant has refused Staff access to his property to inspect it as part of the permitting process. Applicant contends that Staff can conduct whatever inspection is necessary without entering his property.

Pursuant to the Order of the Supreme Court, a hearing was conducted on October 8, 2003 at the Babylon Public Library, 211 route 109, West Babylon, New York before Administrative Law Judge Molly T. McBride. The proceedings began with a legislative hearing at approximately 10:40 a.m. Applicant appeared with his counsel, Franklin Wilks, Esq. from the Coalition of Landlords, Homeowners and Merchants. The Department appeared by Craig L. Elgut, assistant regional attorney. No

persons came forward to speak on the project. At the conclusion of the legislative hearing, an issues conference was convened. No other persons, agencies or organizations participated in the hearing process as parties or sought party status. At the conclusion of the issues conference, the adjudicatory hearing was immediately commenced on the sole issue of whether the Department's demand to conduct an inspection of the project site from applicant's property as part of the permit application review was reasonably necessary. The Supreme Court placed the burden of proof for this issue on applicant.

The following witnesses testified on behalf of applicant: Paul Palmieri and Aram Terchunian, First Coastal Corp., applicant's environmental consultant. Charles T. Hamilton, regional supervisor of the Department's Office of Natural Resources, Region One, Stony Brook, New York testified on behalf of the Department.

The parties submitted post-hearing briefs and the hearing record closed on December 31, 2003 upon receipt of the briefs.

POSITION OF THE PARTIES

Applicant

Applicant maintains that the Department can conduct its permit application review without accessing his property. He contends that the Department can conduct its site

inspection from the water, by boat, or by walking along the shoreline after entering it from a public access point.

Department

The Department contends that the application can not be reviewed to determine if the standards for a tidal wetlands permit have been met without Department personnel accessing applicant's property. Department Staff also argues that applicant's suggestion of using a boat is not practical because they can rely on having boats available to do site inspections.

FINDINGS OF FACT

1. In May 1999, Paul Palmieri, applicant, 123 East Shore Drive, Babylon, New York, applied for a tidal wetlands and protection of waters permit and water quality certificate to expand an existing 92' dock structure by 50 feet and add an 80,000 pound boat lift at his property noted above. The proposed project is located on the Great South Bay, in the Town of Babylon, County of Suffolk.

2. The existing dock structure was permitted by the Department in three phases. The first phase permitted was to reconstruct a bulkhead and to construct a 30' x 10' ramp and a 5' x 45' float and pilings. The permit was issued in 1991. Approximately 5 months later, applicant applied for a permit to construct a 52' fixed pier with additional pilings which was also granted. A third permit application, filed in 1993,

one year after the second permit was issued, sought to expand the existing 52' pier an additional 110', to add 2 boat lifts with 80,000 lb. and 16,000 lb. capabilities and to add 4 moorings pilings clusters. This application was denied. After a request for a hearing was filed by applicant, the matter was resolved by an agreement between the parties which provided for the extension of the boat dock by 40' rather than 110' and the addition of one boat lift rather than two.

3. Applicant refused Department Staff access to his property in 1995 during the review of his 1993 permit application.

4. Department Staff attempted to access applicant's property during its review of the current permit application and applicant has refused Department Staff access to his property.

5. Department Staff notified applicant by letter dated April 7, 2000 that it would need to access the property to conduct a site inspection and complete the permit application review.

6. By letter dated July 7, 2000 the Department denied the latest permit application because it could not gain access to applicant's property to complete the permit application review.

Appendix F
[Hearing Report of Administrative Law Judge Molly T. McBride Dated and Filed January 30, 2004]

7. Applicant filed a request for a hearing on the permit application denial. A hearing was scheduled but adjourned at the request of Staff as witnesses were unavailable. The hearing was rescheduled but applicant and his counsel filed to appear on the rescheduled date.

8. Department Staff moved for an order determining the hearing process abandoned based upon applicant's failure to appear for the hearing or, in the alternative, for an order affirming Staff's denial of the permit application based upon applicant's refusal to allow Department Staff on his property to conduct the site inspection.

9. Commissioner Erin M.Crotty, by order dated February 1, 2002, denied the motion to dismiss due to applicant's failure to appear. The order also deemed the application incomplete based upon the Staff's inability to access applicant's property and, therefore, the hearing request was voided.

10. Applicant commenced a proceeding in New York Supreme Court, Suffolk County, pursuant to CPLR Article 78 Challenging the Commissioner's order. Supreme Court, Suffolk County (Baisley, J.), by decision dated May 5, 2003 granted the petition to the extent of remanding the matter to the Department for a hearing to allow applicant an opportunity to demonstrate the Department's request for an on-site inspection was not reasonable and necessary to evaluate the application for a wetland permit, and otherwise denied the petition. The decision placed the burden of proof

on applicant for the hearing. The hearing was held on October 8, 2003.

11. Applicant testified at the October 8, 2003 hearing that he will not agree to Department Staff entering his property as part of the permit review process. Applicant countered Department Staff's request with his suggestion that Department Staff inspect the project site by boat from the Great South Bay or enter the shoreline from a public access point and walk to applicant's project site. Applicant has not provided a specific route, specific entry point, nor provided details to Staff as to what they would find on any route that they may take to applicant's property if they did in fact enter the shoreline from a public access point and walk to his property.

12. Applicant was advised by Department Staff in writing that a boat was not available to them to conduct a site inspection. Applicant did not allow Staff onto his property after being told that a boat was not available.

13. Department Staff routinely conducts permit application reviews from an applicant's property. Department Staff testified as to numerous reasons why they need access to applicant's property as part of this permit application review.

14. Department Staff testified as to why the alternatives posed by applicant (walking shoreline or boat inspection) are not adequate for the permit application

review in this case. Those methods would not allow Staff to obtain all necessary information to assess the application. By way of example, Staff testified that there has been an abnormal amount of accretion in the area around the boat dock (water depth changed from 5-6' to 2 ½ to less than 4' from 1991 to the date of this application) and Staff would need to evaluate the upland, as well as the dock location to assess possible causes/problems. Charles Hamilton identified approximately twelve items he would be inspecting from applicant's property with respect to the accretion problem alone. Also, from applicant's property Staff would have an elevated spot to view organisms and plants from the water that would not be readily visible from the shoreline or from a boat in the water. The inspector can view the shoals and mudflats below for other factors as well. Based upon those findings, a second site inspection may be warranted at which time Staff would come out with testing gear and take some samplings for testing.

15. The Department's Region One office, where this application is pending, receives approximately 4,000 tidal wetland permit applications each calendar year. Each permit application requires review by Department Staff and four Staff members are responsible for all tidal wetlands applications inspections. The alternative methods proposed by applicant would be too time consuming to employ on a regular basis in the Department's application reviews.

16. Charles Hamilton testified that he conducted 27 site inspections on the day before this hearing. He testified

that that number of site inspections is not unusual due to the volume of permit applications received in their office each year. His other inspectors typically conduct 10-15 inspections per day. If he and his Staff were required to use a boat or take a circuitous route to applicant's property to conduct site inspections, they would not be able to complete as many site inspections and application processing would be delayed.

17. Applicant permitted his environmental consultant and employees to conduct a site inspection from his property.

18. Supreme Court, Justice Baisley, held that "Where NYSDEC can demonstrate a reasonable need for the scientific information obtained by an on-site inspection, such inspections may be valid criteria for a wetlands permit." (Baisley Memorandum Decision, p. 4, citing Thompson v. Dept. of Environmental Conservation 132 AD 2d 665).

CONCLUSIONS OF LAW

1. Section 624.9(b)(1) of 6 NYCRR states: "The applicant has the burden of proof to demonstrate that its proposal will be in compliance with all applicable laws and regulations administered by the department." Further, the Memorandum Decision of Justice Baisley remanding this matter for a hearing placed the burden of proof on applicant to show why the Department's demand for an on-site inspection of applicant's property is not reasonably necessary in order to evaluate the application.

Appendix F
[Hearing Report of Administrative Law Judge Molly T. McBride Dated and Filed January 30, 2004]

2. This permit application is for a tidal wetlands permit, protection of waters permit and water quality certificate.

3. Section 661.1 of 6 NYCRR states, in part, "It is the public policy of the State to preserve and protect tidal wetlands, and to prevent their despoliation and destruction, giving due consideration to the reasonable economic and social developments of the State." The Department is entrusted with implementing the state's tidal wetlands policy.

4. Section 661.9(b) of 6 NYCRR identifies the standards for a tidal wetlands permit to be issued. In summary, the applicable standards require a showing that the permitted activity will preserve and protect tidal wetlands, prevent the despoliation and destruction of wetlands, and not have an undue adverse impact on the present or potential value of the wetlands for marine food production, wildlife habitat and flood and hurricane and storm control.

5. Standards for issuance of a water quality certification are found at 6 NYCRR 608.9 and the protection of waters permit issuance standards are found at 6 NYCRR 608.8.

6. Department Staff identified numerous reasons why they need access to applicant's property to conduct the permit application review and why applicant's alternatives are not acceptable. Applicant has not met his burden of proof to show why access to this property is not reasonably

necessary as part of the permit application review. Department Staff provided specific sworn testimony as to why that type of inspection would not be sufficient.

RECOMMENDATION

I recommend that the Commissioner find that applicant has not met his burden of proof to show that Department Staff's request for access to his property as part of its permit application review is not reasonably necessary. Department Staff has indicated that they must deny the permit application because they were denied access to the property. Therefore, I recommend that the Commissioner affirm Staff's denial of the permit application unless Respondent provides Department Staff the necessary access to his property within 20 days of the Commissioner's decision. If applicant provides Department Staff with the necessary access, then I recommend that Staff conduct the site inspection and take the appropriate action on the application.

Appendix G - Ruling of the Commissioner, State of New York, Department of Environmental Conservation, Dated and Filed February 1, 2002 [47a - 50a]

STATE OF NEW YORK
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1010

In the Matter

-of-

the Application for a tidal wetlands permit, pursuant to Environmental Conservation Law of the State of New York ("ECL") Article 25 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") Part 661 by

PAUL PALMIERI

Applicant

Application No. 1-4720-00666/00009

RULING OF THE COMMISSIONER

February 1, 2002

Appendix G
[Ruling of the Commissioner, State of New York, Department of Environmental Conservation, Dated and Filed February 1, 2002]

Pursuant to 6 NYCRR Part 624.8(b)(i) Staff of the New York State Department of Environmental Conservation ("DEC Staff", "Department") duly served a motion for administrative judicial intervention upon Paul Palmieri (the "Applicant") on or about June 28, 2001. Said motion was supported by the affirmation of assistant regional attorney Craig L. Elgut, Esq. and the affidavit of DEC staff Charles T. Hamilton, Supervisor of Natural Resources, Region One. Applicant opposed said motion by affidavit of Richard Young, Esq., counsel for Applicant.

The motion seeks an Order determining the Applicant's failure to appear for a hearing an abandonment of the hearing process, thereby deeming the applicant's request for a hearing on his tidal wetlands application withdrawn and denying any further administrative remedy. In the alternative, Staff seeks an Order that affirms Staff 's denial of the permit application due to the permit application being incomplete.

Staff documents by affirmation of Craig L. Elgut, Esq. that:

(i) Applicant applied for a tidal wetlands permit to expand a residential dock an additional 50 feet and to add an 80,000 lb. boat lift;

(ii) By letter dated July 7, 2000 DEC Staff denied the application after notifying applicant that

the Staff required access to the site to complete the application review and Staff was denied access;

(iii) Applicant requested a hearing after receipt of the denial;

(iv) An adjudicatory hearing was rescheduled to be held on June 25, 2001.

A copy of the motion and supporting papers and the Applicant's opposing affidavit were filed with the Office of Hearings and Mediation Services. The hearing and the motion were assigned to Administrative Law Judge Molly T. McBride ("ALJ"). Attached to this Ruling is the ALJ's Ruling on Motion and Summary Report, which I adopt as my own, subject to my comments below.

Under the Department's permit processing rules, applicants are required to supply Department Staff with sufficient information to afford Staff a reasonable opportunity to evaluate information in determining whether to approve, modify or deny a request for a Department permit. As set forth in the ALJ's report, applicants must supply this information or otherwise cause their application to be deemed incomplete requiring further information before Staff can make a reasonable determination on the proposed project.

Appendix G
[Ruling of the Commissioner, State of New York, Department of Environmental Conservation, Dated and Filed February 1, 2002]

I find that the Applicant's tidal wetlands application under review must be deemed incomplete for the purposes of permit processing under the Department's Uniform Procedures, 6 NYCRR Part 621. The Applicant's denial of access to his property prevented Department Staff from evaluating the on-site conditions and the proposed project. The ability to gather such information is necessary to make the determination that the permit application is complete. The Applicant's actions effectively relieves Department Staff from taking any further action on the permit application until access to the site and site information is available for Staff's review. Further I am determining that the Applicant's request for hearing on its proposed project is void until such time as the site access and the necessary information is made part of the permit application. Thereafter, if and when said information is supplied and Staff's redetermination is to deny the proposed project, then the Applicant will be afforded a hearing on Staff's denial of the requested permit.

For the New York State Department
of Environmental Conservation

S/_____
By: Erin M. Crotty, Commissioner

Date: Albany, New York
February 1, 2002

Appendix H - Ruling on Motion and Summary Report of Molly McBride (ALJ) [51a - 66a]

STATE OF NEW YORK
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1010

In the Matter

-of-

the Application for a tidal wetlands permit, pursuant to Environmental Conservation Law of the State of New York ("ECL") Article 25 and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") Part 661 by

PAUL PALMIERI

Applicant

Application No. 1-4720-00666/00009

RULING ON MOTION AND SUMMARY REPORT

-BY-

S/_____
Molly McBride
Administrative Law Judge

Appendix H
[Ruling on Motion and Summary Report of Molly McBride (ALJ)]

PROCEDURAL BACKGROUND

Applicant Paul Palmieri ("Applicant") applied to the New York State Department of Environmental Conservation ("'DEC', "Staff", "Department') in May, 1999 for a tidal wetlands permit pursuant to ECL Article 25 and 6 NYCRR 661. The application was denied on July 7, 2000 and Applicant requested an adjudicatory hearing. A hearing was scheduled for March 27, 2001 but was adjourned due to the unavailability of Staff's witness. The hearing was rescheduled for June 25, 2001. Applicant failed to appear for the hearing. DEC Staff served a notice of motion for administrative judicial intervention pursuant to 6 NYCRR 624.8(b)(i) on or about June 28, 2001. DEC Staff submitted the following in Support of the motion: affirmation of assistant regional attorney Craig L. Elgut, Esq. and the affidavit of Charles T. Hamilton, Supervisor of Natural Resources for the DEC, Region One, sworn to on June 28, 2001. Applicant opposed the motion by Affirmation of Richard W. Young, Esq. counsel for Applicant, dated July 9,2001.

Staff's Motion was served on the Office of Hearings and Mediation Services as was Applicant's opposing papers. The hearing and now this motion were assigned to Administrative Law Judge Molly T. McBride ("ALJ").

Staff moves for an order deeming the Applicant's failure to appear at an adjudicatory hearing as an abandonment of the hearing process which in turn deems the

Appendix H
[Ruling on Motion and Summary Report of Molly McBride (ALJ)]

Applicant's request for a hearing withdrawn. In the alternative, Staff seeks an Order that affirms Staffs denial of the permit application.

BACKGROUND

Applicant owns a private residence at 123 East Shore Road, Babylon, New York, on the Great South Bay. This Applicant has a history of filing permit applications with the Department. In 1991 the Applicant applied for a permit to reconstruct a bulkhead and to construct a 30' x 10' ramp and a 5' x 45' float and pilings. The permit was issued. Approximately 5 months later, Applicant applied for a permit to construct a 52' fixed pier with additional pilings. This application was also granted.

One year after the second permit was issued, Applicant sought to expand the exiting 52' pier an additional 110', to add 2 boat lifts with 80,000 lb. and 16,000 lb. capabilities and to add 4 mooring pilings clusters. Staff denied this application. A hearing was requested by the Applicant after the denial. The parties entered into settlement discussions and ultimately resolved the matter. A Stipulation of Settlement was entered into by the parties on May 30, 1995 wherein the Applicant agreed to modify the application and reduce the extension of the boat dock from 110' to 40' and to reduce the boat lift request from two boat lifts to one boat lift. Based upon these changes, Staff withdrew its objections to the issuance of the permit and a permit was issued in June, 1995.

Appendix H
[Ruling on Motion and Summary Report of Molly McBride (ALJ)]

In May, 1999 the Applicant applied for a permit to construct an additional 50' extension of the dock and to add an 80,000 lb. boat lift. This is basically what was requested by the Applicant in his 1995 application, when combined with what was permitted in June, 1995.

The May, 1999 application was denied by Staff by letter dated July 7, 2000. The Notice of Permit Denial states, in part: "You failed to allow Department Staff to inspect your property to observe the conditions at the site in order to determine whether or not your proposal complies with the standards for permit issuance. Therefore, this application for permit is hereby denied." It is undisputed that Applicant has refused Staff access to his property to inspect it as part of the permitting process. Applicant contends that Staff can conduct whatever inspection is necessary from the water, without entering his property.

An adjudicatory hearing was scheduled for March 27, 2001 in Babylon, New York. The hearing was adjourned due to the unavailability of Staffs witness. The parties finally settled on June 25, 2001 as the rescheduled date for the hearing. The ALJ served on both parties by facsimile, a letter dated May 10, 2001 and a Notice of Public Hearing confirming the June 25, 2001 hearing date. The ALJ and Staff appeared at the hearing site on June 25, 2001. Neither the Applicant nor his counsel appeared. Counsel for the Applicant later indicated that he did not believe that a firm date had been set for the hearing.

Appendix H
[Ruling on Motion and Summary Report of Molly McBride (ALJ)]

STAFF'S POSITION

Staff seeks a denial of the application based on Applicant's failure to appear for the hearing and due to the incompleteness of the application. Staff advised Applicant that an inspection of his property, from his property rather than by boat, is essential for the review of the application. Absent the inspection, the permit can not be granted.

APPLICANT'S POSITION

Applicant's counsel's affidavit in opposition to the motion only addresses Staff's request to deny the application based on Applicant's failure to attend the hearing. However, he has addressed the issue of the site inspection in earlier correspondence with the Department. Applicant has denied the DEC all access to his property. He insists that Staff conduct its inspection from the least intrusive manner available that being from the waterway."[1]

FINDINGS OF FACT

After a review of the pleadings and papers submitted herein by the parties, I find that the following facts are not in dispute:

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1. By letter dated April 27, 2000, counsel for the Applicant advised DEC that his client would not consent to an inspection from the property and suggested an inspection from the water.

Appendix H
[Ruling on Motion and Summary Report of Molly McBride (ALJ)]

1. By application dated May 25, 1999 Applicant Paul Palmieri applied for a tidal wetlands permit to construct a 50' extension to an existing pier and to add one boat lift.

2. Staff attempted to inspect Applicant's property in April, 2000 as part of the application review process. Access was denied by the Applicant.

3. By letter dated July 7, 2000 DEC Permit Administrator Mark Carrara advised Applicant's counsel that due to Applicant's failure to allow an inspection from the property, the permit application was being denied.

4. A Notice of Permit Denial was issued to the Applicant by the DEC on July 7, 2000. The Notice stated, in part, "You failed to allow Department staff to inspect the property to observe the conditions at the site in order to determine whether or not your proposal complies with the standards for permit issuance. Therefore, this application for permit is hereby denied."

5. Applicant requested an adjudicatory hearing on the denial of the application.

6. The hearing was scheduled for June 25, 2001 in Babylon, New York. Applicant failed to appear for the hearing.

DISCUSSION

6 NYCRR 624.6(c) allows for the bringing of a motion at any time. Motions made prior to the hearing shall be filed with the ALJ and served on all parties. The ALJ shall then rule upon the motion prior to the completion of testimony. 6 NYCRR 624.8(b)(i) grants the authority to an ALJ to rule upon all motions and requests, including those that decide the ultimate merits of the case.

DISMISSAL DUE TO APPLICANT'S FAILURE TO APPEAR

Staff requests that the Applicant be denied an adjudicatory hearing due to his failure to appear for the hearing scheduled for June 25, 2001. Applicant claims to have not been aware that the hearing was rescheduled. To deny the hearing based upon the Applicant's failure to appear for the hearing is a drastic remedy. While the Notice for the hearing was sent by facsimile by the Office of Hearings to the Applicant's counsel on May 10, 2001, there is no confirmation that counsel saw that letter and Notice. Frankly, scheduling errors occur and such a severe penalty as requested by Staff is not warranted here. Also, Staff has submitted no law in support of the request.

Appendix H
[Ruling on Motion and Summary Report of Molly McBride (ALJ)]

RIGHT TO INSPECT

The application is for a tidal wetlands permit. Tidal wetlands in New York State are regulated by Part 661 of 6 NYCRR. It is the public policy of the State to protect and preserve tidal wetlands and to prevent their despoliation and destruction. Part 661.2(a) states: "Tidal wetlands constitute one of the most vital and productive areas of the natural world and collectively have many values . . . Therefore, the protection and preservation of tidal wetlands is essential." There are five standards that govern whether the Department will issue a tidal wetlands permit. Those standards are defined at 6 NYCRR 661.9(b)(i)-(v).

The Applicant has the burden of establishing that the applicable standards will be met. 6 NYCRR 661.9(a)

In the instant case, the Applicant failed to allow Staff onto his property. Staff notified Applicant in writing that it was a necessary part of the permit process to have access to the property to conduct the inspection. Despite being notified of the Department's need to inspect, the Applicant continued to deny access. As stated, the Applicant has not addressed the issue of an inspection from the property in his opposing papers. However, in April, 2000 Applicant's attorney sent a letter to DEC indicating that his client would not consent to the inspection from his property. Counsel cited 3 cases in support of his position that the inspection from the property was tantamount to an illegal and warrantless search. After reviewing the cases cited, I

disagree. The circumstances of those cases, which I will address below, were significantly different than here and, therefore, the rulings are not controlling here.

The leading case cited by the Applicant is *Sokolov v. Village of Freeport, 52 N.Y.2d 341.* In *Sokolov,* the Court of Appeals held that a Village ordinance that required an inspection of residential rental property in order for the owner to rent out the property was a warrantless search and therefore unconstitutional. The Village had enacted an ordinance requiring all owners of rental property to have a permit issued before renting the property. The permit would only be issued after the Village inspected the property. The Court held "We hold today that the imposition of a penalty upon a landlord for renting his premises without first consenting to a warrentless search violates the property owner's Fourth Amendment rights." (*Sokolov* at 343) The Court noted that if the property owner does not consent. he will he deprived of the economic benefit of his property. Here, the Applicant is seeking a privilege. He is asking to be allowed to construct a pier extension and add a boat lift into the Great South Bay. The issue is, does the construction harm the delicate nature of the tidal wetlands. The DEC is entrusted with the important task of preserving and protecting tidal wetlands. That job requires the Department to carefully review each application for a tidal wetlands permit to ensure that it meets the standards enumerated in part 661. As stated by Charles Hamilton, DEC Region One supervisor of Natural Resources, the Department can not

complete their job without inspecting the property. The suggestion of the Applicant that the inspection take place from the water is not viable. Staff has refuted that in the Hamilton affidavit. First it would be wrong to have the Applicant dictate to Staff how they should do their job. But, more importantly, it is crucial for Staff to have complete access to the wetlands and no other type of inspection will suffice. Staff has been entrusted with the responsibility of ensuring that the existing and potential values of tidal wetlands for marine food production and wildlife habitat and other values associated with tidal wetlands are protected.

The Hamilton affidavit addresses why an inspection from the Applicant's property is a necessary part of this application process. Hamilton asserts that Staff must conduct an extensive site review to assess a specific project and it's specific wetland environment. (Hamilton, p. 2) By denying Staff access, Staff is denied the opportunity to conduct a meaningful technical review of the project site as required by the regulations. (Hamilton, p. 2) , ". . . , staff must access the condition of the wetlands in the area of the existing structure as well as the area where the proposed extension would be located. Staff needs to determine whether the existing structure is causing impacts which may be compounded by increasing the size of the structure." (Hamilton, p. 5) Applicant does not address any of these issues in it's opposing papers. While Applicant's counsel submitted case law that he alleges supports his client's position that an inspection is a warrantless search, he has offered no response to Staffs specific arguments on why they

need to enter the property in this case. Applicant has never stated how Staff can determine if the application meets the standards for permit issuance without actually inspecting the property.

I find staff's arguments persuasive and agree that in order to meet the duties imposed by Part 661, an inspection of the site is necessary.

The Applicant's attorney also cited *Town of Brookhaven v. Ronkoma Realty Corp., 154 A.D. 2d 665, Second Dept:, 1989*. This case also involved an ordinance requiring rental property to be inspected and a permit issued prior to rental. For the same reasons cited in *Sokolov*, the Court found that the ordinance was unconstitutional. Finally, Applicant cited *People v. Ost, 121 A. D. 2d 571*, Second Dept., 1986. In *Ost*, the police had entered the defendant's business, without a warrant, examined his books, without permission, and used the information gathered to charge the defendant criminally. The Court found the warrantless inspection a violation of the defendant's constitutional rights and the charges were dismissed. For obvious reasons the facts in *Ost* can not be equated with the facts here.

One of the differences between a tidal wetlands permit and a permit to operate rental property is that the tidal wetlands permit is asking for a privilege, not a right. There is no right to a tidal wetlands permit. The Applicant here will not lose his property in any way or suffer economic harm if the permit is not granted. There is no monetary or

criminal penalty for him if he fails to allow the inspection. The only consequence is that the application must be denied. The Applicant is still free to enjoy his property as he did before filing the application. He has previously been granted permits to construct the pier, reconstruct the bulkhead and install a boat lift. The pier has already been extended from it's initial 52' to 92'. The Applicant is free to chose [sic.] which route to take. He has elected to refuse Staff access to his property. Surprisingly, the permits previously issued to the Applicant all provide the DEC with the right to enter the property to ensure that the permit conditions are being complied with. All permits issued by the DEC grant the Department that right. Applicant has already consented, by accepting the permits, to Staff entering his property. It is illogical for Applicant to deny access to Staff as a part of this application. However, that is his right.

Staff can not determine if the application meets the standards for permit issuance without inspecting the property. Therefore, the application is incomplete. Staff has no discretion with regards to applying the standards. If it can not be determined that the standards are met, the application simply can not be deemed complete.

DENIAL DUE TO INCOMPLETENESS

Staff argues in it's motion that the application is in fact incomplete due to the lack of an inspection. Staff notified Applicant in writing on April 1, 2000 that it was a

necessary part of the permit process to have access to the property to conduct the inspection. At that time, Mark Carrara, Deputy Permit Administrator for the DEC stated to the Applicant that the permit application would be denied if Staff was not allowed to inspect the property. Despite being notified of the Department's need to inspect, the Applicant continued to deny access.

Clearly, the application can not be reviewed by Staff without the inspection and therefore, the application is in essence incomplete. Staff cites the Interim Decision in *Bath Petroleum Storage, Inc, November 6, 2000* in support of it's argument that the completeness of the application is an issue that is not subject to review.

The Interim Decision, issued by Deputy Commissioner Carl Johnson held that there is a bar against adjudicating the completeness of a permit application in 6 NYCRR section 624.4(c)(7).

> A review of relevant administrative decisions reveal the basis for the bar. The purpose of the prohibition where an application is deemed complete is to give an Applicant comfort and certainty that its application cannot be undone at the hearing stage, i.e., assertions by intervening parties to adjourn the hearing on incompleteness grounds. See, Matter of Applications of Department of Sanitation Southwest Brooklyn Incinerator, Interim Decision, March 2, 1994. ". . . the completeness determination . . . is intended to

reflect the point at which the application contains sufficient information to commence regulatory review." Matter of LaFever Excavating, Inc., Interim Decision, October 28, 1991. ". . . once the completeness determination is made, there is no turning back." Matter of Applications of NYC Department of Environmental Protection, Preliminary Ruling of ALJ, Match 24, 1994; See also, Matter of Applications of Fulton County Board of Supervisors, Decision of Commissioner, February 13, 1987. *Bath* at p.7

I agree with Staff that the application is in fact incomplete when Staff can not access the property. The Applicant bears the burden of showing that the application meets the standards enumerated in Part 661. That burden is met with written submissions AND an inspection of the site. The application information submitted must be field verified. Qualified, trained biologists visit the site to assess the area. A tidal wetlands permit can be issued only if the proposed activity meets the standards for permit issuance in 6 NYCRR 661.9(b)(i)-(v). Nothing in Part 661 gives Staff the discretion to work outside of these standards. Obviously, Staff can not assess whether the standards are met without sending trained professionals to the site to do their job. If Staff can not determine if the standards arc met, Staff can not conduct a complete the [sic.] review of the application.

Appendix II
[Ruling on Motion and Summary Report of Molly McBride (ALJ)]

Based upon the Interim Decision in *Bath*, I have no authority to review Staffs determination that the application is incomplete.

CONCLUSION

Staff has requested that the denial of the application based upon incompleteness be affirmed or in the alternative, the application be dismissed due to the Applicant's failure to attend the hearing. Staff has cited no legal authority to deny the application solely due to Applicant's failure to appear at the hearing. Further, the penalty is too harsh to deny the application when Applicant's attorney claims to not have been aware of the hearing being scheduled. Also, the permit denial issued by the Department was not the proper vehicle in this circumstance. Staff acknowledges that the application is incomplete. Staffs remedy to that particular circumstance is to issue an [sic.] Notice of Incomplete Application rather than a denial of the application based upon incompleteness.

RECOMMENDATION

Based upon the record before me and the Findings of Fact herein, I recommend that the Notice of Denial be vacated and that Staff's determination that the application is incomplete as stated in correspondence to the Applicant and the motions papers herein, be deemed a Notice of Incomplete Application. Further, the Request for Hearing filed by the Applicant is void since such a request can not be made in response to a Notice of Incomplete Application. The

application can not be processed further until such time as it is complete. This Ruling can be referred to the Commissioner for final determination.

Appendix I - Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations [67a - 103a]

The constitutional provision involved is the Fourth Amendment to the U.S. Constitution which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Statutes involved are:

ECL § 15-0505 entitled "Protection of navigable waters; excavation or fill; permit" provides:

> 1. No person, local public corporation or interstate authority shall excavate or place fill below the mean high water level in any of the navigable waters of the state, or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the state and that are inundated at mean high water level or tide, without a permit issued pursuant to subdivision 3 of this section. For the purposes of this section, fill shall include, but shall not be limited to, earth, clay, silt, sand, gravel, stone, rock, shale, concrete (whole or fragmentary), ashes, cinders, slag, metal, or any other similar material whether or not enclosed or contained by (1) crib work of wood, timber, logs, concrete or

metal, (2) bulkheads and cofferdams of timber sheeting, bracing and piling or steel sheet piling or steel H piling, separated or in combination. Nothing contained in this section is intended to be, nor shall be construed to limit, impair or affect the memorandum of understanding which any state department enters into with the Department of Environmental Conservation or the general powers and duties of the Department of Transportation relating to canals or the general powers and duties of the Department of Environmental Conservation relating to flood control.

6 NYCRR §621.1 entitled "Definitions" provided:

(a) *Adjudicatory public hearing* means a trial type proceeding which provides the opportunity for adjudication on the basis of evidence, including direct testimony and cross examination provided under article 3 of the State Administrative Procedure Act, section 70-0109 of the Environmental Conservation Law (ECL), section 621.6 of this Part and Part 624 of this Title.

(b) *Chief permit administrator* means an employee of the department located in the main office of the department and designated to act on the commissioner's behalf in carrying out this Part.

(c) *Commissioner* means the Commissioner of Environmental Conservation, or any employee of the department designated to act on the commissioner's behalf in carrying out this Part.

(d) *Complete application* means an application for a permit which is in an approved form and is determined by the department to be complete for the purpose of commencing review of the application but which may need to be supplemented during the course of review in order to enable the department to make the findings and determinations required by law.

(e) *Delegated permit* means a permit issued by the department for which a comparable permit may be required by Federal law. Delegated permits are issued by the department for the following programs:

(1) Resource Conservation and Recovery Act (RCRA) of 1976, 42 USC 6901 et seq., 1984 (see section 621.16 of this Part) (ECL article 27, title 9) for any hazardous waste management facilities (HWMF) or remedial action plans (RAP) under ECL article 27, title 9 except those limited to the disposal of waste containing polychlorinated biphenyl (PCB) only.

(2) Clean Water Act (CWA) amendments, 33 USC 1251 et seq., 1987 (see section 621.16 of this Part) (ECL article 17, titles 7 and 8) for any State pollutant discharge elimination systems (SPDES) permit involving an industrial or municipal discharge under ECL article 17, titles 7 and 8.

(3) Clean Air Act (CAA) amendments, 42 USC 7401 et seq., 1990 for any air pollution control source under ECL article 19 subject to the following Federal requirements:

(i) prevention of significant deterioration (PSD);

(ii) new source review in nonattainment areas; or

(iii) title V facility permits.

(f) *Department* means the New York State Department of Environmental Conservation, or a local agency to which the department has delegated permitting or review authority.

(g) *Emergency* means an event which presents an immediate threat to life, health, property, or natural resources.

(h) *ENB (Environmental Notice Bulletin)* means the publication of the department published pursuant to section 3-0306 of the ECL, accessible on the

department's Internet web site at http://www.dec.state.ny.us.

(i) *EPA* means the United States Environmental Protection Agency.

(j) *Legislative public hearing* means a proceeding which provides an opportunity for public comment provided by section 621.7 of this Part.

(k) *Local government* means a village, town, city or county.

(l) *Major project* means any action requiring a permit identified in section 621.2 of this Part, which is not specifically defined as minor.

(m) *Minor project* means any action listed as minor in section 621.4 of this Part, subject to the reservations of section 621.3(c)(3) of this Part. All actions identified as Type II in Parts 617 and 618 of this Title are minor. Minor projects are projects which by their nature and with respect to their location are not likely to have a significant effect on the environment.

~~(n)~~ *Modification* means any change or amendment whatsoever to a permit that is currently in force, including transfer form one person to another.

(o) *Permit* means any permit, certificate, license or other form of department approval, suspension, modification, revocation, renewal, reissuance or recertification, including any permit condition and variance, that is issued in connection with any regulatory program listed in section 621.2 of this Part.

(p) *Person* means any corporation, firm, partnership, association, trust, estate, one or more individuals, any other legal entity or any unit of Federal, State or local government or any agency or subdivision thereof, including any State department, bureau, commission, board or other agency, public authority or public benefit corporation.

(q) *Project* means any action requiring one or more permits identified in section 621.2 of this Part.

(r) *Regional permit administrator* means an employee of the department located in each of the nine regional offices of the department and designated to act on the commissioner's behalf in carrying out this Part.

(s) *Regulatory agency* means the department, another state agency, or a local government having any form of jurisdiction over a project.

(t) *Renewal* means the reissuance, recertification or extension of any permit for previously approved

activities which will be continuing on the same site without material change.

(u) *SEQR* means the State Environmental Quality Review Act, article 8 of the Environmental Conservation Law and Parts 617 and 618 of this Title.

(v) *Tentative determination* means a notice of intent to issue or deny a permit.

(w) *Title V facility permit* means a permit, which is issued by the department pursuant to Subpart 201-6 of this Title, for a facility or a defined area source, group, or category of emission units at a facility.

(x) *Variance* means relief from the provisions of specific permit program implementing regulations as provided herein.

6 NYCRR §621.7 entitled "Determination to conduct a public hearing" provided:

(a) After a permit application for a major project is complete (see provisions of sections 621.3 through 621.5 of this Part), and notice in accordance with section 621.6 of this Part has been provided, the department shall evaluate the application and any comments received on it to determine whether a public hearing will be held. If a public hearing must be held, the applicant and all persons who have filed

comments shall be notified by mail. This shall be done within 60 calendar days of the date the application is complete. A public hearing may be either adjudicatory or legislative.

(b) The determination to hold an adjudicatory public hearing shall be based on whether the department's review raises substantive and significant issues relating to any findings or determinations the department is required to make pursuant to the Environmental Conservation Law, including the reasonable likelihood that a permit applied for will be denied or can be granted only with major modifications to the project because the project, as proposed, may not meet statutory or regulatory criteria or standards. In addition, where any comments received from members of the public or other interested parties raise substantive and significant issues relating to the application, and resolution of any such issue may result in denial of the permit application, or the imposition of significant conditions thereon, the department shall hold an adjudicatory public hearing on the application.

(c) Regardless of whether the department holds an adjudicatory public hearing, a determination to hold a legislative public hearing shall be based on the following:

(1) if a significant degree of public interest exists;

(2) to fulfill the requirements of section 617.8 of this Title; or

(3) for HWMF permits or RAPs, if notification of opposition to a draft permit or RAP, and a request for a hearing is received during the public comment period.

(d) Mere expressions of general opposition to a project are insufficient grounds for holding an adjudicatory public hearing on a permit application. In order to raise substantive and significant issues, written comments expressing objection or opposition to an application must explain the basis of that opposition and identify the specific grounds which could lead the department to deny or impose significant conditions on the permit.

(e) The department normally does not require public hearings in connection with applications for minor projects, as identified in sections 621.3 and 621.4 of this Part. If a public hearing is required for a minor project, the application shall be treated as a major project for purposes of this Part.

(f) If a permit for a project is denied, or is issued with significant conditions attached and an adjudicatory public hearing was not held, then the

applicant may request that one be held. Such a request must be made within 30 calendar days of the date of the mailing of either the notice of denial or the permit with conditions. The hearing shall commence within 45 calendar days of the date of receipt of the request.

(g) If a public hearing on an application is required to be held, it shall commence on or before 90 calendar days after the date the application is complete.

(h) The public adjudicatory hearing will be held according to the provisions of Part 624 of this Title.

6 NYCRR § 621.15 entitled "Special provisions" provided:

(a) Any time period specified in this Part may be extended for good cause, by mutual written consent of the applicant and the department. The EPA must be notified in those cases where a proposed extension will exceed the time periods established in Federal regulation. This provision does not supersede the requirement that the public can request judicial review in State court if a title V permit is not issued within 18 months of the date that an application is complete.

(b) At any time during the review of an application for a new permit, modification, or renewal, the department may request in writing any additional information which is reasonably necessary to make any findings or determinations required by law. Such a request shall be explicit, and shall indicate the reasonable date by which the department is to receive the information. Failure to provide such information by the date specified in the request may be grounds for denial of the application.

(c) The department may issue general permits to allow work to eliminate damage caused by natural disasters or extraordinary weather not unique to a particular locality, including repair or replacement in location and in kind of facilities which existed prior to the damage. Processing of such permits need not follow the full procedural requirements of this Part.

(d) General permits may also be issued by the department for projects that are determined not to have a significant impact on the environment, and that have been subjected to the full procedural requirements of this Part for major projects. General permits under the SPDES program and the air pollution control program in accordance with Part 201 of this Title may be issued for regulated activities for which the department determines that all the requirements of this subdivision have been met.

(e) The department may require as a condition to a permit, and prior to commencement of work, that the permittee post a bond or other financial assurance acceptable to the department of specified amount with the department. This is to ensure faithful compliance with the terms of the permit, and is used for the indemnification of the State for any costs which might result from failure to so comply. The bond or other financial assurance shall remain in effect until the work is completed to the satisfaction of the department.

(f) Where this Part requires exchange of written materials within specified time periods, postmark dates shall satisfy the requirements, when not otherwise specifically provided.

(g) The department may issue a research, development, and demonstration permit for any hazardous waste treatment facility which proposes to utilize an innovative and experimental hazardous waste treatment technology or process for which permit standards have not been promulgated under section 373-1.9 of this Title. This permit must include terms and conditions to assure protection of human health and the environment.

(1) Variances from permit application and issuance requirements of this Part may be granted by the

department, except there may be no variance from any provisions requiring public participation.

(2) Such permits may be issued for a period not to exceed one year and may not be renewed more than three times, with each renewal period not to exceed one year. Experimental permits may be revoked when it is determined by the department to be necessary to protect human health and the environment.

(3) These permit applications are subject to all other procedural requirements of this Part.

28 U.S.C. Section 1257(a) entitled "State courts, certiorari provides:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Appendix I
[Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations]

CPLR Section 306-b entitled "Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with notice of petition or order to show cause" provides:

> Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the filing of the summons and complaint, summons with notice, third-party summons and complaint, or petition, provided that in an action or proceeding, except a proceeding commenced under the election law, where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

CPLR Section 307 entitled "Personal service upon the state

> 1. Personal service upon the state shall be made by delivering the summons to an assistant attorney-general at an office of the attorney-general or to the attorney-general within the state.

2. Personal service on a state officer sued solely in an official capacity or state agency, which shall be required to obtain personal jurisdiction over such an officer or agency, shall be made by (1) delivering the summons to such officer or to the chief executive officer of such agency or to a person designated by such chief executive officer to receive service, or (2) by mailing the summons by certified mail, return receipt requested, to such officer or to the chief executive officer of such agency, and by personal service upon the state in the manner provided by subdivision one of this section. Service by certified mail shall not be complete until the summons is received in a principal office of the agency and until personal service upon the state in the manner provided by subdivision one of this section is completed. For purposes of this subdivision, the term "principal office of the agency" shall mean the location at which the office of the chief executive officer of the agency is generally located. Service by certified mail shall not be effective unless the front of the envelope bears the legend "URGENT LEGAL MAIL" in capital letters. The chief executive officer of every such agency shall designate at least one person, in addition to himself or herself, to accept personal service on behalf of the agency. For purposes of this subdivision the term state agency shall be deemed to refer to any agency, board, bureau, commission, division, tribunal or other entity which

constitutes the state for purposes of service under subdivision one of this section.

CPLR Rule 2103 entitled "Service of papers" provides:

(a) Who can serve. Except where otherwise prescribed by law or order of court, papers may be served by any person not a party of the age of eighteen years or over.

(b) Upon an attorney. Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon the party's attorney. Where the same attorney appears for two or more parties, only one copy need be served upon the attorney. Such service upon an attorney shall be made:

1. by delivering the paper to the attorney personally; or

2. by mailing the paper to the attorney at the address designated by that attorney for that purpose or, if none is designated, at the attorney's last known address; service by mail shall be complete upon mailing; where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period; or

3. If the attorney's office is open, by leaving the paper with a person in charge, or if no person is in charge, by leaving it in a conspicuous place; or if the attorney's office is not open, by depositing the paper, enclosed in a sealed wrapper directed to the attorney, in the attorney's office letter drop or box; or

4. by leaving it at the attorney's residence within the state with a person of suitable age and discretion. Service upon an attorney shall not be made at the attorney's residence unless service at the attorney's office cannot be made; or

5. by transmitting the paper to the attorney by facsimile transmission, provided that a facsimile telephone number is designated by the attorney for that purpose. Service by facsimile transmission shall be complete upon the receipt by the sender of a signal from the equipment of the attorney served indicating that the transmission was received, and the mailing of a copy of the paper to that attorney. The designation of a facsimile telephone number in the address block subscribed on a paper served or filed in the course of an action or proceeding shall constitute consent to service by facsimile transmission in accordance with this subdivision. An attorney may change or rescind a facsimile telephone number by serving a notice on the other parties; or

6. by dispatching the paper to the attorney by overnight delivery service at the address designated by the attorney for that purpose or, if none is designated, at the attorney s last known address. Service by overnight delivery service shall be complete upon deposit of the paper enclosed in a properly addressed wrapper into the custody of the overnight delivery service for overnight delivery, prior to the latest time designated by the overnight delivery service for overnight delivery. Where a period of time prescribed by law is measured from the service of a paper and service is by overnight delivery, one business day shall be added to the prescribed period. "Overnight delivery service" means any delivery service which regularly accepts items for overnight delivery to any address in the state; or

7. [Expires and repealed Sept 1, 2009] by transmitting the paper to the attorney by electronic means where and in the manner authorized by the chief administrator of the courts by rule upon the party's written consent. The subject matter heading for each paper sent by electronic means must indicate that the matter being transmitted electronically is related to a court proceeding.

(c) Upon a party. If a party has not appeared by an attorney or the party's attorney cannot be served, service shall be upon the party by a method specified

in paragraph one, two, four, five or six of subdivision (b) of this rule.

(d) Filing. If a paper cannot be served by any of the methods specified in subdivisions (b) and (c), service may be made by filing the paper as if it were a paper required to be filed.

(e) Parties to be served. Each paper served on any party shall be served on every other party who has appeared, except as otherwise may be provided by court order or as provided in section 3012 or in subdivision (f) of section 3215. Upon demand by a party, the plaintiff shall supply that party with a list of those who have appeared and the names and addresses of their attorneys.

(f) Definitions. For the purposes of this rule:

1. "Mailing" means the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service within the state;

2. "Electronic means" means any method of transmission of information between computers or other machines designed for the purpose of sending

and receiving such transmissions, and which allows the recipient to reproduce the information transmitted in a tangible medium of expression;

3. "Facsimile transmission" means any method of transmission of documents to a facsimile machine at a remote location which can automatically produce a tangible copy of such documents.

CPLR Rule 3025(a) entitled "Amended and supplemental pleadings" provides:

(a) Amendments without leave. A party may amend his pleading once without leave of court within twenty days after its service, or at an time before the period of responding to it expires, or within twenty days after service of a pleading responding to it.

ECL Section 15-0501 entitled "Protection of certain streams; disturbances of stream beds; permit" provides:

1. Except as provided in subdivisions 4, 5, 6 and 7 of this section, no person or public corporation shall change, modify or disturb the course, channel or bed of any stream as defined in subdivision 2, or remove any sand, gravel or other material from the bed or banks of such a stream without a permit issued pursuant to subdivision 3 of this section.

2. For the purposes of this section, stream shall mean that portion of any fresh surface watercourse, except lakes or ponds having a surface area greater than ten acres at mean low water level, for which the department has adopted or may hereafter adopt pursuant to section 17-0301, any of the following classifications or standards:

AA and AA (T),

A and A (T),

B and B (T),

C (T)

Small ponds or lakes with a surface area at mean low water level of ten acres or less, located in the course of a stream, shall be considered a part of the stream and subject to regulation under this section.

3. Permit.

a. Before granting a permit, a permit renewal or a permit modification pursuant to this section, the department shall ascertain the probable effect on the health, safety and welfare of the people of the state, and the effect on the natural resources of the state, including soil, forests, water, fish and aquatic

resources therein, likely to result from the proposed project or work.

b. In order to minimize the disturbance of a stream and in order to prevent unreasonable erosion of soil, increased turbidity of the waters, irregular variations in velocity, temperature and level of waters, the loss of fish and aquatic wildlife and the destruction of natural habitat thereof, and the danger of flood or pollution, the department shall review the permit application or request for renewal or modification of an existing permit and may approve the manner and the extent to which the stream bed or channel may be changed, altered or modified and may limit the quantity of sand, gravel or other material to be removed, designate the location in the bed, channel or banks of the stream from which the sand, gravel or other material may be removed, or it may deny the permit or request.

c. The rules and regulations adopted by the department to implement this section and the provisions of article 70 of this chapter and rules and regulations adopted thereunder shall govern the processing of permit applications, renewals, modifications, suspensions and revocations under this section.

4. No permit under this section shall be required of any local public corporation which has entered into a

written memorandum of understanding with the department establishing the plan of operation to be followed in carrying out projects or work affecting water courses so as to afford proper protection to the public beneficial uses of such water courses.

5. No permit under this section shall be required of any state department or state public corporation. State departments and state public corporations may enter into a written memorandum of understanding with the department concerning projects or work of the type for which a permit would be required under this section if the project or work were undertaken by a person or local public corporation. The memorandum may establish procedures for review by the department of the plans for such projects or work and for written recommendations by the department with respect thereto.

6. No permit under this section shall be required for emergency work in a stream or on its banks which is immediately necessary to protect the health, safety and well-being of any person or persons or to prevent damage to personal or real property, provided that the department is given written notification by registered mail or telegraph within forty-eight hours after the commencement of the work and within forty-eight hours following the completion of such work. Whenever emergency work is performed as provided in this subdivision, it shall be performed in a manner

that will cause the least change, modification, disturbance or damage to the course or bed of the stream and its banks.

7. No permit under this section shall be required for certain agricultural activities of persons and corporations actively cultivating land devoted to agriculture whether or not the same be along a stream or watercourse as described in subdivision 2; providing that these agricultural activities consist only of crossing and recrossing of such streams or watercourses by livestock or by wheeled farm equipment normally used for traditional agricultural purposes; or the use of such stream or watercourse for withdrawal of water for irrigation where such withdrawal does not require altering the bed, banks or course of the stream in any manner.

8. The requirements of this section shall be in addition to those specified in section 15-0505 of this title, provided however, that the department may, by rule and regulation, provide that only one application for a permit or request for renewal or modification of an existing permit need be filed with the proposed project or work requires a department permit under this section and section 15-0505 of this title.

ECL § 15-0503 entitled "Protection of water bodies; permit" provides:

Appendix I
[Constitutional Provisions, Treaties, Statutes, Ordinances and Regulations]

1. Except as provided in subdivision [fig 1] 3 of this section

a. No dam [fig 1] shall be erected, constructed, reconstructed or repaired by any person or local public corporation without a permit issued pursuant to subdivision [fig 2] 2 of this section. As used in this section, and section 15-0511 of this title, "dam" means any artificial barrier including any earthen barrier, together with its appurtenant works, which impounds or will impound waters, provided it has (1) a height equal to or greater than fifteen feet or (2) a maximum impoundment capacity equal to or greater than three million gallons; except that for purposes of this section a dam shall not include any structure which has (i) a height equal to or less than six feet regardless of the structure's impoundment capacity, or (ii) an impoundment capacity not exceeding one million gallons regardless of the structure's height.

b. Except where a lease or other appropriate conveyance of an interest authorizing the use and occupancy of state-owned lands underwater has been obtained from the commissioner of general services pursuant to subdivision seven of section seventy-five of the public lands law, no dock, wharf, platform, breakwater, mooring, or other structure in, on or above waters shall be erected, placed, constructed, reconstructed, or expanded after the effective date of this paragraph by any person or local public

corporation without a permit issued pursuant to subdivision [fig 1] 2 of this section. The term "reconstructed" as used [fig 2] in relation to docks, wharves, platforms, breakwaters, mooring or other structures pursuant to this paragraph shall mean the substantial rebuilding of structures or facilities and shall not apply to ordinary maintenance or repair of existing functional structures or facilities, such as repainting, redriving pilings or replacing broken boards in docks.

c. A city, town, village or county may submit to the commissioner a local law or ordinance regulating docks or other structures as described in paragraph b of this subdivision. The commissioner shall review such law or ordinance to determine whether it provides environmental protection comparable to, or greater than, the provisions of such paragraph and any regulations promulgated thereunder. If the commissioner determines that the local law or ordinance submitted meets such requirements, the commissioner may delegate, upon such terms and conditions as he or she deems appropriate, to the local government the authority to administer the permit program and to charge a fee for permit processing. Any delegation may be revoked by the commissioner if he or she finds that the local government has failed to carry out the program in accordance with the terms of the delegation.

2. Permits.

a. Before granting a permit, a permit renewal or a permit modification pursuant to this section, the department shall ascertain the probable effect on the health, safety and welfare of the people of the state, and the effect on the natural resources of the state likely to result from the proposed project or work.

b. The department shall review the permit application or request for renewal or modification of an existing permit and may approve the manner and extent to which the waters of the state or the banks and shore thereof will be affected by the proposed project or work and may grant or deny the permit or request, or may grant the permit or request with such conditions as might appear necessary to safeguard life, property and natural resources during and after the execution of the proposed project or work.

c. The rules and regulations adopted by the commissioner to implement this section and the provisions of article 70 of this chapter and rules and regulations adopted thereunder shall govern permit applications, renewals, modifications, suspensions and revocations under this section.

d. The requirements of this section shall be in addition to those specified in sections 15-0501 and 15-0505 of this title, provided however, that the

department may, by rule and regulation, provide that only one application for a permit or request for renewal or modification of an existing permit need be filed when the proposed project or work requires a department permit under this section and any other section of this title.

3. The requirement of a permit pursuant to this section shall not apply to the following facilities:

a. A dock, pier, wharf or other structure used solely as a landing place on water providing dockage for five or fewer boats and encompassing within its outer perimeter an area less than four thousand square feet;

b. A mooring facility providing mooring for fewer than ten boats;

c. Seasonal replacement or reinstallation of structures referenced and listed in paragraph b of subdivision 1 of this section installed prior to the effective date of this paragraph.

4. The design, preparation of plans, estimates and specifications and the supervision of the erection, construction, reconstruction and repair of all the structures hereinbefore referred to shall be done by a licensed professional engineer, or in the case of farm ponds for which a permit is required, by an engineer or conservationist employed by a governmental

agency cooperating with a soil conservation district, or by an engineer employed by the department.

5. Notwithstanding the provisions of this or any other chapter or law to the contrary, no reservoirs for any purpose shall hereafter be constructed on the Upper Hudson River in the Adirondack park between Luzerne and the river's source; the Boreas river from its mouth to Durgin Brook; the Indian river from its mouth to Abanakee Dam; and the Cedar river from its mouth to Cedar River Flow, by the state or by any river regulating board.

ECL § 15-0505 entitled "Protection of navigable waters; excavation or fill; permit" provides:

1. No person, local public corporation or interstate authority shall excavate or place fill below the mean high water level in any of the navigable waters of the state, or in marshes, estuaries, tidal marshes and wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the state and that are inundated at mean high water level or tide, without a permit issued pursuant to subdivision 3 of this section. For the purposes of this section, fill shall include, but shall not be limited to, earth, clay, silt, sand, gravel, stone, rock, shale, concrete (whole or fragmentary), ashes, cinders, slag, metal, or any other similar material whether or not enclosed or contained by (1) crib work of wood, timber, logs, concrete or

metal, (2) bulkheads and cofferdams of timber sheeting, bracing and piling or steel sheet piling or steel H piling, separated or in combination. Nothing contained in this section is intended to be, nor shall be construed to limit, impair or affect the memorandum of understanding which any state department enters into with the Department of Environmental Conservation or the general powers and duties of the Department of Transportation relating to canals or the general powers and duties of the Department of Environmental Conservation relating to flood control.

2. A permit application or request for a permit renewal or modification shall be made on forms provided by the department and shall consist of a description of the character and extent of the proposed project or work, drawings, plans and specifications providing the location and details of the proposed project or work, and such additional information as the department may require.

3. Before granting a permit, a permit renewal or a permit modification pursuant to this section the department shall ascertain the probable effect on the use of such waters for navigation, the health, safety and welfare of the people of the state and the effect on the natural resources of the state, including soil, forests, water, fish and aquatic resources therein, likely to result from the proposed project or work.

4. The department shall review the permit application or request for renewal or modification of an existing permit and may grant or deny the permit or request, or may grant the permit with such conditions as will safeguard life or property against danger or destruction and as will make the navigable waters safe for use by the public.

5. The rules and regulations adopted by the department to implement this section and the provisions of article 70 of this chapter and rules and regulations adopted thereunder shall govern the processing of permit applications, renewals, modifications, suspensions and revocations under this section.

6. The provisions of subdivisions 1, 2, 3 and 4 of this section shall not apply to emergency work in waters described in subdivision 1 of this section which is immediately necessary to protect the health, safety and well-being of any person or persons or to prevent damage to personal or real property, provided that the department is given written notification by registered mail or telegraph within forty-eight hours after the commencement of the work and within forty-eight hours following the completion of the work. Whenever such emergency work is performed as provided in this subdivision, it shall be performed in a manner that will cause the least change,

modification, disturbance or damage to the environment.

7. The requirements of this section shall be in addition to those specified in section 15-0501 of this title, provided however, that the department may, by rule and regulation, provide that only one application for a permit or request for renewal or modification of an existing permit need be filed when the proposed project or work requires a department permit under this section and section 15-0501 of this title.

ECL § 15-0515 entitled "Review" provides:

A determination, order or issuance, modification or denial of a permit, pursuant to sections 15-0501, 15-0503 and 15-0505 shall be reviewable in a proceeding pursuant to article 78 of the Civil Practice Law and Rules.

ECL § 15-0905 entitled "Review" provides:

1. The applicant or any person or public corporation, who or which has filed a notice of appearance in the proceedings before the department and is affected by a decision made pursuant to this article, may review such decision under the provisions of article 78 of the Civil Practice Law and Rules.

2. A special proceeding for such review must be commenced within sixty days after the service in person or by mail of a copy of the decision upon the attorney of record of the applicant and of each person who has filed a notice of appearance, or to such applicant in person directly if not represented by an attorney.

3. In the event that upon such review, the judgment of the court modifies the decision of the department or any accompanying documents or maps, the department shall cause such judgment to be filed or recorded, as the case may be, in each place where the final decision of the department was filed and recorded, and such modified maps and documents shall be final and conclusive.

ECL § 25-0404 entitled "Judicial review" provides:

Any person aggrieved by the issuance, denial, suspension, or revocation of a permit may within thirty days from the date of the commissioner's order seek judicial review pursuant to article seventy-eight of the civil practice law and rules in the supreme court for the county in which the tidal wetlands affected are located. In the event that the court may find that the determination of the commissioner constitutes the equivalent of a taking without compensation, and the land so regulated otherwise meets the interest and objectives of this act it may, at

the election of the commissioner, either set aside the order or require the commissioner to acquire the tidal wetlands or such rights in them as have been taken, proceeding under the power of eminent domain.

General Construction Law § 20 entitled "Day, computation" provides:

> A number of days specified as a period from a certain day within which or after or before which an act is authorized or required to be done means such number of calendar days exclusive of the calendar day from which the reckoning is made. If such period is a period of two days, Saturday, Sunday or a public holiday must be excluded from the reckoning if it is [fig 1] an intervening day between the day from which the reckoning is made and the last day of the period. In computing any specified period of time from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified period of time is reckoned shall be excluded in making the reckoning.

Navigation Law § 32 entitled "Location of structures in or on navigable waters" provides:

> 1. Notwithstanding the provisions of subdivision two of section forty-six-a of this chapter, no wharf, dock, pier, jetty, platform or other structure built on floats,

columns, open timber, piles or similar open-work supports, temporary or permanent, shall be constructed, installed, repaired, modified, expanded or otherwise placed by any person in the navigable waters of the state or in a navigable channel or replaced by any person in such waters or channel on or after the effective date of this section after having been removed from such waters or channel for a period in excess of thirty days so as to interfere with the free and direct access to such waters from the property, wharf, dock or similar structure of any other person unless written permission is obtained therefor from such other person.

2. In case any written complaint shall be filed with the commissioner of general services and he shall have cause to believe, or in case the commissioner himself shall have cause to believe, that any person is violating the provisions of this section or any rule or regulation promulgated pursuant to this section, the commissioner shall cause a prompt investigation to be made.

3. The commissioner shall have the power, after hearing on due notice, to make and serve an order, setting forth the findings of fact and conclusions therefrom, directing any person constructing, installing, repairing, modifying, expanding or otherwise placing or using any such structure to either move or remove the said structure or to reconstruct,

repair or modify the same within such reasonable time and in such manner as shall be specified in said order, and it shall be the duty of every such person to obey, observe and comply with such order and the conditions therein prescribed. The commissioner is authorized to adopt, amend, repeal and enforce such rules and regulations as he may deem necessary to govern administrative procedures applicable to hearings under this section.

4. It shall be unlawful for any person to fail, omit or neglect to comply with such order or to fail to move, remove, reconstruct, repair or modify said structure as provided in the order within a reasonable time as designated by the commissioner.

5. Any person who fails, omits or neglects to comply with or otherwise violates any such order shall be liable for a civil penalty of not more than one hundred dollars for such violation and an additional civil penalty of not more than one hundred dollars for each day during which such violation continues, to be assessed by the commissioner.

6. The commissioner is hereby authorized to commence an action or proceeding in a court of competent jurisdiction to compel compliance with any order made and to recover any penalty assessed pursuant to the provisions of this section.

7. Any civil penalty or order issued by the commissioner under this section shall be reviewable in a proceeding under article seventy-eight of the civil practice law and rules.

8. The provisions of this section shall not apply to marine terminals including piers, wharves, docks, bulkheads, slips, basins and other structures or facilities used in the transportation of waterborne cargo or passengers in interstate or foreign commerce.